In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-6971

DR. HERBERT R. NORTHRUP,
PETITIONER,

v.

THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner, Dr. Herbert R. Northrup, prays that a writ of certiorari issue to review the decisions and orders of the United States Court of Appeals for the First Circuit and of the United States District Court for the District of Rhode Island entered in the case of *Grinnell Corporation* v. *Mary C. Hackett* on August 17, 1976, and on February 13, 1976. and April 19, 1976, respectively.

Opinions Below.

The August 17, 1976, opinion and order of the Court of Appeals and the April 19, 1976, opinion of the District Court are not reported and appear in the appendix. The February 13, 1976, opinion of the District Court is reported at 70 F.R.D. 326 (D. R.I. 1976).

Jurisdiction.

The order of the Court of Appeals was entered on August 17, 1976. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

Questions Presented.

Does a scholar's right of academic freedom under the First Amendment exempt him from discovery in a civil action with which he has no connection?

Does an expert's right to his intellectual property under the Fifth Amendment exempt him from discovery in a civil action with which he has no connection?

Under Rule 26 of the Federal Rules of Civil Procedure, may a party in a civil action as a matter of right depose an expert who has no connection with the action?

Will United States Magistrates be able to fulfill their statutory role if a District Court can reverse a Magistrate's protective order based upon findings of fact, by the expedient of disregarding those findings and of itself making findings?

Does a scholar have a constitutional privilege against discovery in a civil action when that discovery is sought in bad faith or to harass?

Statutes and Rules Involved.

Section 636(b)(1), Title 28, U.S.C.

"Notwithstanding any provision of law to the contrary —

"(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law."

Rule 26, Federal Rules of Civil Procedure.

. . . . . .

"(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

"(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

. . . . . .

"(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows. . . ."

Standing Order of the United States District Court for the District of Rhode Island.

"13. Additional Duties of Magistrate and Standing Operating Procedures.

. . . . . .

"(6) Motions in Criminal Cases, Civil Cases and Motions Calendars —

. . . . . .

"(b) CIVIL — Upon the close of the date for filing of an opposition to a motion in a civil case made under Rule 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, and motions for protective orders under Rule 37, Federal Rules of Civil Procedure, except as may be ordered by the district judge to whom the case is assigned, all such motions shall be transmitted to the magistrate for hearing and determination. All other civil motions shall be referred by the clerk to the respective district judge for action."

"13.1 Reconsideration of Magistrate's Ruling by District Judge.

"A magistrate's ruling on a motion, not incident to the exercise of his trial jurisdiction, shall be final and conclusive unless a party thereto moves for reconsideration by a district judge. A motion for reconsideration shall be made within (5) days of the magistrate's ruling. Reconsideration shall not be *de novo* but shall be the same as on an appeal on a question of law."

Statement of the Case.

A. THE UNDERLYING SUIT.

The Grinnell Corporation began this action on May 15, 1972, to enjoin the Director of the Department of Employment Security of the State of Rhode Island from paying unemployment compensation benefits to strikers. Grinnell contends that the federal law requires the economic neutrality of the state in labor-management relations and that the federal law preempts the field so that such payments and the state statute authorizing them violate the Supremacy Clause of the United States Constitution.

The United Steelworkers of America, AFL-CIO have intervened as a defendant. The Chambers of Commerce of the United States and of Greater Providence have intervened as plaintiffs.

On May 30 and 31, 1972, the District Court heard Grinnell's motion for preliminary injunction. At the hearing Grinnell produced the expert testimony of Professors Armand J. Thieblot, Jr., and Ronald M. Cowin. Based upon a nationwide study they had made, these two scholars testified that there was a massive use of public payments to support strikers and that these payments had the effect of either prolonging strikes or inducing higher settlements.

Grinnell also introduced Thieblot and Cowin's book, Report No. 6, WELFARE AND STRIKES: *The Use of Public Funds to Support Strikers*, into evidence. This book was published in May, 1972, by the Industrial Research Unit of The Wharton School of Finance and Industry of the University of Pennsylvania.

At the hearing the Chambers of Commerce attempted to introduce into evidence the affidavit of the petitioner, Dr. Herbert R. Northrup, on the same subject. This affidavit was not prepared for the Grinnell case. The District Court refused to admit the affidavit into evidence but marked it for identification (App. 7a-8a).

Dr. Northrup was then and is now a Professor of Industry at The Wharton School, Chairman of the Labor Relations Council, and Director of the Industrial Research Unit at The Wharton School. He wrote the foreword to WELFARE AND STRIKES (App. 1a-6a).

On June 26, 1972, the District Court denied a preliminary injunction and dismissed the action. At the hearing the District Court did not let either intervening party cross-examine.

On March 15, 1973, the Court of Appeals reversed and remanded the case for trial. *Grinnell Corp.* v. *Hackett*, 475 F. 2d 449 (1973).

B. THE FIRST HEARING BEFORE THE MAGISTRATE.

In April, 1975, the Steelworkers noticed the depositions of Thieblot, Cowin, and Northrup. Grinnell and the three experts moved for a protective order. The District Court referred the motions to the United States Magistrate under local Standing Order 13(6)(b).

The Steelworkers submitted an affidavit reciting the communications between counsel, and stating that they wanted the depositions only to cross-examine to discover the financing and background of WELFARE AND STRIKES (App. 8a-10a).

The Magistrate granted the protective order on May 28, 1975. He found that the deponents were experts and not actors in the events giving rise to the strikes, so that consequently the Steelworkers could not depose them of right. However, he gave the Steelworkers leave to move under subsection (B) of Rule 26(b)(4) for permission to take the depositions (App. 11a-12a).

C. THE SECOND HEARING BEFORE THE MAGISTRATE.

The Steelworkers moved for reargument or alternatively for permission to take the depositions. In support of the motion the Steelworkers submitted the same affidavit as before, and the docket entries and an affidavit of Thieblot filed in the *Dow* case.*

In opposition to the motion Dr. Northrup submitted an affidavit with supporting exhibits relating the response of organized labor to WELFARE AND STRIKES (App. 12a-59a). This showed the following history:

On August 4, 1972, Emil Mazey, Secretary-Treasurer of the United Automobile Workers, demanded that the Acting Dean of The Wharton School submit the book for faculty approval (App. 14a, 39a-40a).

In September, 1973, the General Secretary of the International Federation of Petroleum and Chemical Workers canceled a speaking engagement at the Labor Relations Coun-

**Dow Chemical Company* v. *S. Martin Taylor*, a similar case pending in the United States District Court for the Eastern District of Michigan.

cil on orders, he told Dr. Northrup from the AFL-CIO (App. 14a-15a, 43a-44a).

On May 4, 1973, Leo Perlis, Director of the AFL-CIO Department of Community Services, demanded of Dr. Northrup the names of the corporations and industrial foundations, if any, that funded WELFARE AND STRIKES (App. 15a, 45a). Dr. Northrup sent Perlis a 50-page printed report explaining the Industrial Research Unit and its financing (App. 15a, 46a-50a).*

On May 11, 1973, Perlis wrote the President of the University of Pennsylvania attacking the book, stating that the University had been exploited and demanding an investigation

> ". . . of the background behind the publication of this book. Who commissioned it? Who, specifically, paid for it? Who bought copies of it? Who distributed it? Who selected the authors and on what basis?" (App. 15a, 52a-53a.)

The President replied that a university had to present a variety of views (App. 15a, 54a-56a). To this Perlis said, among other things, that what the book

> ". . . says or what it doesn't say on a highly controversial public issue of major importance is not only a question of merit but also of motivation . . . ,"

and he reiterated his demand about background and financing (App. 15a, 57a-59a).

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* Perlis takes much credit for realizing the potential of public payments to subsidize strikes. He so testified on deposition in the *Grinnell* case, and so stated to the authors of WELFARE AND STRIKES as reported in the book (p. 37).

Dr. Northrup pointed out that high union figures such as I.W. Abel, Perlis and Mazey discuss matters affecting organized labor, and that they do not want the use of public benefits to support strikers exposed or studied any more than they want the practice stopped (App. 16a). He stated that the Steelworkers sought the depositions to coerce and intimidate him and scholars in general from studying and conducting research into such union policies (App. 13a, 16a).

The movants also brought out to the Magistrate facts in the record about the Steelworkers' good faith. The Steelworkers did not seek the depositions until two years after the remand of the case by the Court of Appeals. The Steelworkers did not appear at the second day of the hearing on preliminary injunction, and the District Court had to direct their attendance. The Steelworkers did not answer the complaint, submit a memorandum despite the District Court's request, or join in the defendant's motion to dismiss. On the appeal the Steelworkers filed an exiguous brief consisting of eight pages inclusive of captions, formal matter, and closing salutations, and did not raise the denial of cross-examination.

On July 3, 1975, the Magistrate denied the Steelworker's motions. He found that the Steelworkers had not shown exceptional circumstances to warrant the depositions, and that "it is more probable than not" that the Steelworkers had "a private purpose and not a purpose of the litigation" in seeking the depositions, so that to permit the depositions would visit the deponents "with the very evils of annoyance, embarrassment, oppression and undue burden or expense which Rule 26(c) is designed to guard against" (App. 60a-61a).

D. RECONSIDERATION BY THE DISTRICT COURT.

On February 13, 1976, the District Court reversed the Magistrate in a three-part opinion (App. 62a-75a).

1. It said that under local Rule 13.1 it could not reconsider the matter *de novo* but could do so as on an appeal on a question of law (App. 65a).

2. It held as a mixed question of law and fact that apart from the protective order the Steelworkers had a right to the depositions.

It concluded that when facts known or opinions held by an expert were not "acquired or developed in anticipation of litigation or for trial" as used in the preamble to Rule 26(b)(4), but such facts or opinions were relevant to the subject matter of the action under Rule 26(b)(1), the requirements of subsections (A) and (B) of Rule 26(b)(4) did not apply, and a party could depose an expert of right even though he was not an actor in or viewer of the events giving rise to the action (App. 70a-73a).

It itself found as a fact that the facts known and opinions held by the three experts in this case were not acquired or developed in anticipation of litigation, and that they were relevant to the subject matter of the action (App. 68a).*

3. It vacated the protective order on the following reasoning:

That information about the background and financing of WELFARE AND STRIKES could itself be or could lead to admissible evidence bearing on the credibility of the book, and that such credibility is relevant to the subject matter of the action (App. 73a).

That as a matter of law a showing that "the likelihood of harassment is 'more probable than not' is . . . insufficient without a concomitant showing that the information sought was 'fully irrelevant and could have no possible bearing on the issues'" (App. 74a).

*In the forword to WELFARE AND STRIKES, Dr. Northrup states that the study was undertaken to answer the questions raised by the court in *ITT Lamp Division* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970).

That though it would be hesitant to conclude as a matter of law that the Magistrate's finding that one of the Steelworkers' purposes was harassment was clearly erroneous, it could not accept his finding that another purpose was not to uncover evidence relevant to the litigation (App. 74a).

That, consequently, the Magistrate was clearly in error to conclude that the Steelworkers did not have as part of their motivation discovery of information to undermine WELFARE AND STRIKES (App. 74a).*

In its opinion the District Court mistakenly stated that Dr. Northrup's affidavit had been introduced into evidence at the hearing on preliminary injunction (App. 63a). By this mistake the District Court tied Dr. Northrup directly into the case and gave itself a sole basis to justify his deposition. Dr. Northrup moved for reargument with materials from the record proving the mistake (App. 77a). On April 19, 1976, the District Court denied the motion without mentioning its mistake (App. 76a-78a). It merely said that the depositions were to be "strictly limited to the involvement of these three persons in the creation and publication of Report No. 6 . . ." (App. 77a).

E. APPEAL AND MANDAMUS TO THE COURT OF APPEALS.

The petitioner, Dr. Northrup, appealed the orders of the District Court on the authority of *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993 (10th Cir. 1965) (App. 79a).

On June 14, 1976, the Court of Appeals dismissed the appeal *sua sponte* (App. 80a).

Dr. Northrup then petitioned for a writ of mandamus (App. 81a-87a). On August 17, 1976, the Court of Appeals denied

*The District Court also said the deponents had not raised privilege (App. 73a). The deponents in fact argued their constitutional rights.

the writ in a one-paragraph memorandum which stated in part:

> "We share the petitioner's theoretical concern about overly broad discovery, particularly against persons not directly involved in the litigation. However, we cannot say that the court acted beyond its range of permissible discretion under Rule 26, Fed. R. Civ. P. in allowing defendant-intervenor to take petitioner's deposition." (App. 88a.)

Reasons for Granting the Writ.

I. THE INTERPRETATION OF RULE 26 BY THE LOWER COURT WILL DEPRIVE PETITIONER AND OTHER SCHOLARS OF RIGHTS OF ACADEMIC FREEDOM, AND TO JUST COMPENSATION FOR THE TAKING OF INTELLECTUAL PROPERTY, AND WILL LEAD TO UNWHOLESOME ABUSES OF FEDERAL DISCOVERY.

Scholars have a right of academic freedom under the First Amendment. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).

By virtue of research and publications scholars often become experts. Thus the two categories of scholars and experts overlap.

The courts vary as to the duty of an expert to testify about his expert facts or opinions.

Some hold an expert has no duty to testify at all on the basis that expert facts and opinion are in the nature of a

property right which cannot be taken without due compensation. *Buchman* v. *State*, 59 Ind. 1, 26 Am. Rep. 75 (1877).

Others analogously hold that an expert cannot be compelled to testify without having contracted to do so. *Pennsylvania Co.* v. *City of Philadelphia*, 262 Pa. 439, 105 Atl. 630 (1918); *People* v. *Thorpe*, 296 N.Y. 224, 72 N.E. 2d 165 (1947).

Still others require an expert to testify as to expert facts but not as to opinions. *In re Roelker*, Fed. Cas. No. 11995 (D. Mass. 1854).

Some require an expert to testify about both expert facts and opinions provided he does not specially have to prepare to do so. *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611 (1875).

There are further variations. See Annot., *Compelling Expert to Testify*, 77 A.L.R. 2d 1182 (1961).

In the past the problem centered on compelling an expert to testify at trial. This problem still exists, but a still greater problem now centers on compelling an expert to testify on discovery.

The general rule was that the courts did not permit discovery of an expert. Occasionally a court bent the general rule to permit discovery of a trial expert in certain kinds of intricate cases (drug, patent, and condemnation). No court allowed and no litigant sought discovery on an expert with no tie to the case.

In 1970 this Court carved out exceptions to the general rule about no discovery of experts. It adopted Rule 26(b)(4) to set up a mechanism for the limited discovery of experts, and to clear up the case law caused by the lack of any express provision in the rules on the subject. Advisory Committee's Note, Rule 26, Proposed Amendments to Discovery Rules, 48 F.R.D. 497, 503-505 (1970).

Rule 26(b)(4) provides that discovery of facts and opinions held by experts, if relevant to the subject matter of the litigation under Rule 26(b)(1), ". . . and acquired or developed

in anticipation of litigation or for trial, may be obtained only as follows. . . ."

Subsection (A) deals with trial experts the gist of whose testimony can be obtained by interrogatories, but who cannot be further discovered without permission. Subsection (B) deals with non-trial experts retained or specially employed in anticipation of litigation or preparation for trial who cannot be discovered at all without a showing of exceptional circumstances. Subsection (C) deals with costs.

The rule does not deal with the expert who was an actor in or viewer of the events giving rise to the action. He is treated like an ordinary witness. *Duke Gardens Foundation, Inc.* v. *Universal Restoration, Inc.*, 52 F.R.D. 365 (S.D. N.Y. 1971). Advisory Committee's Note, 48 F.R.D. at 503.

The rule does not permit discovery of experts with no tie to the case and who are not actors or viewers.

The few reported cases all follow the plain meaning of the rule. *Breedlove* v. *Beach Aircraft Corp.* 57 F.R.D. 202 (N.D. Miss. 1972); *Bailey* v. *Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972); *Crockett* v. *Virginia Folding Box Co.*, 61 F.R.D. 312 (E.D. Va. 1974); *Inspiration Consolidated Copper Co.* v. *Lumbermens Mutual Casualty Co.*, 60 F.R.D. 205 (S.D. N.Y. 1973); *United States* v. *John R.-Piquette Corp.* v. *Schultz*, 52 F.R.D. 370 (E.D. Mich. 1971); *Herbst* v. *ITT*, 65 F.R.D. 528 (D. Conn. 1975).

The District Court turns the rule inside out. It interprets the rule ". . . to curtail . . . discovery . . . only if the information sought was 'acquired or developed in anticipation of litigation or for trial . . .'" (App. 71a). Or, as it otherwise states, "There is absolutely nothing in the wording of Rule 26 to indicate that facts or opinion held by experts and not acquired for the purpose of preparing for litigation cannot be freely discovered under 26(b)(1) unless the expert is a witness to or actor in an event underlying the litigation" (App. 71a).

In short, the District Court takes as its basic premise that, prior to Rule 26(b)(4), discovery of experts was unlimited and that that rule put limitations on such unlimited discovery.

This premise and interpretation of the rule are worse than wrong, they are revolutionary.

Experts will unwillingly have their brains picked. In a medical malpractice action, for example, a physician with no tie to the case, but who had become eminent by working and writing about the procedure involved, could be deposed. Also, under modern rules of evidence learned treatises or statements from them can be introduced into evidence. The authors of these treatises will be deposed. To cap the matter, besides sanctioning this discovery, the District Court makes it free!

Academic freedom will come under frontal attack. A case in a controversial area, for example, desegregation, could become a springboard to harass scholars with no tie to a case but who have expert information "relevant to the subject matter." And the harassment would be broad-gauge, since the discovery could go to matters affecting credibility, a broad concept indeed, including factors personal to the scholar, *e.g.*, that a desegregation scholar had a racially mixed marriage.

Litigants and the courts will face still another costly abuse of discovery. To evade the limitations on expert discovery (or to scare experts off a case, or both), lawyers will notice the depositions of experts not, they will say, to get facts and opinions developed for litigation, but to get the expert's "background and expertise."

The misinterpretation of the rule presents novel issues independent of the underlying cause. The constitutional rights involved are important, and affect a broad class. The potential for mischief in the proper functioning of the federal courts is immediate and wide-spread. The Court should exercise its powers over practice and procedure to correct the problem.

Hickman v. *Taylor*, 329 U.S. 495 (1947); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964).

Finally, for Dr. Northrup this is not as it is for the Court of Appeals a "theoretical concern." Unless the Court grants the writ, he will never get a chance for review. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

II. The Decisions Below Undercut the Statutory Authority of Magistrates to Fulfill their Role in the Administration of Justice.

Congress has partially met the need for judicial manpower by expanding the role of United States Magistrates. 28 U.S.C. §§ 631 *et seq.*

Magistrates have proved to be especially valuable in handling discovery motions. Discovery motions often present factual questions which the magistrates must resolve. For the system to work, however, the rulings of magistrates must have proper finality. This means that District Courts cannot consider these rulings *de novo* and substitute their views for those of magistrates on the facts, or themselves to find facts outside of the record.

The amendment to § 636(b)(1), Title 28, U.S.C., effective October 23, 1976, resolved certain conflicts and ambiguities. The amendment spells out the matters a magistrate can hear and determine, and provides that in such matters a court can only reconsider a magistrate's ruling where it is clearly erroneous or contrary to law. The lower courts in this case had previously adopted that standard of review. Standing Order 13.1 of the District Court for the State of Rhode Island; *DeCosta* v. *Columbia Broadcasting System, Inc.*, 520 F. 2d 499 (1st Cir. 1975).

This is the law, but there are questions. Out of skepticism about magistrates, or out of reluctance to be bound by magistrates' decisions, will *nisi prius* courts give the law its full measure? If they do not, will appellate courts find that the need to set guidelines creates exceptions to the general rule against interlocutory appeals? If they do not, the law could become a dead letter and another burden in the system of justice because by the time of appeal the issue will be moot.

The law which the lower courts functioned under in this case is the same as the law in the 1976 amendment to the Magistrates' Act. A look at what happened in this case gives a glimpse into what will happen in the future.

As we have shown, the District Court misinterpreted Rule 26(b)(4). But in itself that misinterpretation did not clear the way for the Steelworkers to take the depositions they sought. To clear the way, the misinterpretation required a fact to exist, namely, that the experts had not acquired or developed their expert facts or opinions in anticipation of litigation. No such fact existed in the record. (If anything, the book suggested just the opposite, since it had been inspired by the questions on this on-going controversy asked in the *Minter* case.) The Magistrate had not found such a fact. Yet the District Court found such a fact, indeed, invented it!

The next obstacle was the protective order. To overturn it the District Court accepted the Steelworker's self-declared purpose and held that the Magistrate was clearly erroneous in not having accepted it. This begs the question.

The last obstacles were the Magistrate's findings of facts. The District Court never explicitly held that they were clearly erroneous. Rather, it sidestepped one and ignored the other.

The District Court held that as a matter of law the finding of harassment was insufficient without a concomitant showing that the information sought was "fully irrelevant and could have no possible bearing on the issues" (App. 74a). Granted

that the predisposition favors the taking of depositions, nonetheless, this is not the law. If this were the law, regardless of circumstances, a court could never forbid discovery where the information sought was in any way relevant. Significantly, however, Rule 26(c) imposes no such limitation, nor do the cases. *United States* v. *Howard*, 360 F. 2d 373, 381 (3d Cir. 1966); *Jones* v. *Fire & Cas. Ins. Co.*, 266 F. Supp. 91 (D. Conn. 1967); *Wu* v. *Keeney*, 384 F. Supp. 1161 (D. D.C. 1974). See 4 *Moore's Federal Practice* (1976), §§ 26.54 and 26.69, the latter of which states, "there is a substantial number of litigated cases in which the court has ordered that a deposition not be taken." At p. 26-499.

Many of the cases Moore cites deal with depositions sought for a purpose collateral to the litigation. Here, the Magistrate expressly found the Steelworkers had a private purpose unrelated to the litigation (App. 61a). The District Court ignored this, the central finding altogether!

Transparently, the District Court substituted its views of the facts for the Magistrate's. Despite this, the Court of Appeals refused to concern itself. By the time the case is ready for appeal, the issue will be moot. And so it will be when other cases raising the same issue are ready for appeal.

This case squarely presents the question: how will lower courts be instructed and monitored in the use of magistrates?

This is a significant question in the statute and especially the 1976 amendment authorizing the use of magistrates. *United States* v. *Ruzicka*, 329 U.S. 287 (1946); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). The decisions of the lower courts will prove a serious hindrance to the effective administration of the statute. *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296 (1946). And, finally, the District Court with the sanction of the Court of Appeals has so far departed from the accepted course of judicial proceedings that this Court should exercise its power of supervision.

III. This Court Should Rule on a Scholar's Privilege Against Disclosure.

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the Court accorded newsmen a constitutional privilege against disclosure of sources in three instances: where the party is not seeking disclosure in good faith; where he is deliberately harassing the subject; and where the information he seeks is irrelevant or bears only a remote or tenuous relationship to his needs. 408 U.S. at 707-708, 710.

The rationale of a privilege for scholars rests on the same grounds as those of newsmen. Scholars should have no less a privilege. This case and many others indicate the need for such a privilege in both civil and criminal matters.

In this case the Magistrate found bad faith, illicit private purpose, and harassment as facts. Dr. Northrup submits that the refusal of the lower courts to face these facts does not change these facts. Therefore, the decisions of the lower courts conflict with the rationale of the rule in *Branzburg*. In so sensitive an area, such a departure from the accepted and usual course of judicial proceedings calls for this Court to exercise its powers of supervision.

This case also would allow the Court to speak explicitly on the pressing question of the privilege enjoyed by a scholar.

Conclusion.

The writ of certiorari should be granted.

Respectfully submitted,
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Dated: November 17, 1976.

Appendix.

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Appendix.

LABOR RELATIONS AND PUBLIC POLICY SERIES

REPORT NO. 6

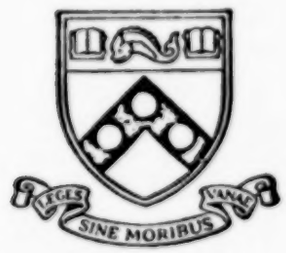
WELFARE AND STRIKES

The Use of Public Funds to Support Strikers

by

ARMAND J. THIEBLOT, JR.
and
RONALD M. COWIN

Foreword by HERBERT R. NORTHRUP



UNIVERSITY OF PENNSYLVANIA
The Wharton School of Finance and Commerce
INDUSTRIAL RESEARCH UNIT

Foreword

In 1968, the Industrial Research Unit inaugurated its Labor Relations and Public Policy monographs as a means of examining issues and stimulating discussions in the complex and controversial areas of collective bargaining and the regulation of labor-management disputes. The first four studies in the series dealt with aspects of the National Labor Relations Act and its administration. The fifth report contained papers read at the fiftieth anniversary conference of the Industrial Research Unit, at which many aspects of labor relations and public policy were discussed. This monograph—Report No. 6 in the series—breaks new ground. It is the first empirical analysis of the impact of government payments to strikers on the American collective bargaining system and on the settlements of disputes under that system.

Organized labor's drive to achieve greater bargaining power, through such mechanisms as coalition bargaining, union mergers, and the development of stronger, unified national and international federations, has created a number of problems for union officials. One of the most significant is the cost of a massive walkout. In order to sustain their drive for larger bargaining units, union officials must promise the rank and file great gains, a factor which can give rise to stronger management resistance and to higher strike incidence. Since strikes on these issues are likely to last a considerable period and involve a large number of persons, the cost of maintaining them can be enormous.

To accomplish their strike objectives, union leaders must be able to protect members from severe economic pain during prolonged labor-management disputes. Various tactics have been developed by organized labor to achieve this goal while at the same time attempting to minimize the financial impact of strikes on union treasuries. One such tactic is the selective strike strategy, where, for example, a union strikes only the key plants of a large firm instead of the entire operation. Another tactic, which has become increasingly important to unions in recent years, is to incorporate public and private welfare funds (from

such programs as Food Stamps, Aid to Families with Dependent Children, General Assistance, and Unemployment Insurance) into the union's strike assistance program. The General Electric strike of 1969-1970 (involving almost 150,000 workers), where it is estimated that about $25 million in public welfare was distributed to strikers, and the General Motors strike of 1970 (involving nearly 330,000 workers), where an estimated $30 million in public aid was dispensed to strikers, provide dramatic examples. Such strategy involving the use of public funds to subsidize union strike efforts is the subject of this book by Dr. Armand J. Thieblot and Mr. Ronald M. Cowin.

Considerable interest regarding the payment of public aid to strikers did not begin developing until the copper industry strike of 1967-1968. This strike, involving a coalition of unions against an entire industry, lasted nearly nine months. During it, striking copper miners in communities of Arizona, Montana, Nevada, New Mexico, and Utah were reported using various forms of welfare to sustain their walkout. By the end of the 1969-1970 General Electric strike, where the public strike assistance mentioned above was used, this interest had developed into great concern. By then it was obvious that if strikes become injurious only to one party (management) because the other party (labor) is being subsidized by the government, a strike will not serve its purpose of inducing a reasonable settlement. In such situations, collective bargaining could cease and union dictation of terms and conditions of employment occur instead, with unreasonable and inflationary settlements the likely result. In addition, concern has been expressed that public policies which permit strikers to obtain welfare could have serious financial impacts on government and the taxpaying public and add additional burdens to our already troubled welfare system.

While the General Motors strike was occurring, an interesting case was being litigated. A strike by the Teamsters' Union against a division of the International Telephone and Telegraph Company (ITT) in Massachusetts causes the company to file a suit in federal district court demanding that this Commonwealth be enjoined from distributing welfare payments to strikers. Counsel for ITT argued that such payments were an unfair and illegal intrusion by a state in the area of collective bargaining which the federal government had preempted by the Taft-Hartley Act. ITT's case rested on the assumption that welfare payments to strikers encouraged the strikers to remain

on strike and discouraged the union from compromising its demands, and, therefore, interfered with the federal policy of free collective bargaining. The district court dismissed the case.

The Court of Appeals, First Circuit, affirmed the lower court,* but in its opinion appeared quite troubled by its lack of information. It noted that ITT was making a novel claim which had not heretofore been considered either in welfare or labor law. The Court of Appeals opinion then set forth the empirical knowledge that it would have desired in order to rule on ITT's claim of injury by virtue of welfare payments to strikers:

> . . . how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received; and studies or expert testimony evaluating the impact of eligibility for benefits on the strikers' resolve; a comparison between strike benefits and welfare benefits; the impact of the requirement that welfare recipients accept suitable employment; how many strikers actually do receive welfare benefits; and a host of other factors. In addition, the state's legitimate interests must also be considered: its interests in minimizing hardships to the families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, its interest in forestalling economic stagnation in local communities, etc.

Nowhere was the evidence gathered which could answer these intriguing questions. This is precisely what this study attempts to do. Dr. Thieblot and Mr. Cowin, who commenced their research in late 1970, also endeavored to determine whether public money support to taxpayers is becoming a pervasive phenomenon or whether it is confined to major strikes or to particular areas. Their study included a careful analysis of literature, detailed interviews with company, union, and welfare officials, and several case studies in which interviews were sought with management and union participants and local welfare officials, and in which newspaper and other local sources of information were carefully studied. The conclusions, for which the authors are solely responsible, are based upon the empirical information reported in this carefully documented study.

* * * *

This study is divided into three parts. Part One (Chapters I and II) is basically introductory. Chapter I summarizes the

* *ITT Division* v. *Minter*, 435 F.2d 989 (1st Cir., 1970); cert. denied, 420 U.S. 933 (1971).

nature of welfare programs which are now available to strikers; Chapter II explains the theory of how the American collective bargaining system is supposed to work and, particularly, what is the role of the strike in making collective bargaining an effective dispute settling and wage settling mechanism. Chapter II then examines theoretically what might be expected to occur if strikers receive tax supported funds.

Part Two (Chapters III-VI) deals with the empirical evidence: how tax supported payments to strikers first occurred and developed since the New Deal of the 1930's and a series of case studies which answer, with a wealth of factual material, the questions posed by the court in *ITT Division* v. *Minter*, and which as well point up other problems and issues.

The final part (Chapters VII, VIII, and IX) weighs the various arguments, including those presented in recent court cases, and presents the conclusions and recommendations of the authors. Appendix A presents a description of the most important of the public aid programs available to strikers, expanding on the discussion in Chapter I; Appendix B presents union documents.

* * * *

It will be obvious to anyone reading this study that it could not have been written without the unstinting help of numerous company, union, and welfare officials, including those at both national and at local plant, union, and welfare agency levels. This we gratefully acknowledge. The authors would especially like to express their appreciation to their wives, Bernice and Diane, for the assistance and encouragement which they provided.

The typing was done by Mrs. Veronica M. Kent and the Misses Nancy Von and Rebecca Giles. The manuscript was edited and the index prepared by Mrs. Marie R. Keeney, and data construction was assisted by Miss Elsa Klemp and Mr. Michael Johns. Mrs. Margaret E. Doyle, Administrative Assistant of the Industrial Research Unit, handled the numerous administrative duties associated with the project. This study was financed by a fund for general Industrial Research Unit research donated by four industrial foundations and thirteen companies.

Dr. Armand J. Thieblot, Associate Professor of Management, College of Business and Public Administration, University of Maryland, did his undergraduate work at Princeton and received his MBA and Ph.D. degrees at the University of Pennsylvania. He is the author of *The Negro in the Banking Industry* and co-

author of *Negro Employment in Finance.* Mr. Ronald M. Cowin received his undergradute degree at the University of Oregon, spent four years in the Marine Corps, where he reached the rank of Captain, and is scheduled to receive his MBA from Pennsylvania's Wharton School in May 1972.

HERBERT R. NORTHRUP, *Director*
Industrial Research Unit
Wharton School of Finance and Commerce
University of Pennsylvania

Philadelphia
April 1972

United States District Court
District of Rhode Island

GRINNELL CORPORATION,
PLAINTIFF

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATIVE SERVICES OF THE STATE OF RHODE ISLAND. C.A. No. 4926
DEFENDANTS

AND

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GREATER PROVIDENCE CHAMBER OF COMMERCE,
PLAINTIFFS-INTERVENORS.

AND

THE UNITED STEELWORKERS OF AMERICA,
DEFENDANT-INTERVENOR.

PLAINTIFF'S EXHIBIT NO. 5 FOR IDENTIFICATION

Affidavit of Dr. Herbert R. Northrup.

Dr. Herbert R. Northrup, being duly sworn, deposes and says:

1. I am the same Dr. Herbert R. Northrup whose affidavit was submitted by the Chamber of Commerce of the United States to the United States District Court, for the District of Maryland, in *Francis v. Davidson*, No. 71-853K.

2. I have considered the allegations in the complaints in *Grinnell Corporation v. Mary C. Hackett, et al.*, CA No. 4926 in the United States District Court for the District of Rhode Island. After considering those allegations, I would respond to the questions posed in said affidavit with the same answers given therein. Specifically the payment of unemployment compensation to strikers in Rhode Island will have the same effect upon the collective bargaining process as the various payments referred to in said affidavit.

Further affidavit saith not.

HERBERT R. NORTHRUP, PH.D.

United States District Court
District of Rhode Island

[Caption omitted in printing.]

Affidavit of Rudolph L. Milasich, Jr.

I, Rudolph L. Milasich, Jr., Esquire, one of the attorneys for the defendant-intervenor United Steelworkers of America, AFL-CIO, in *Grinnell* v. *Hackett, et al.*, C. A. No. 4926, (D.R.I.), being duly sworn, deposes and says:

1. During the latter part of March, 1975, I contacted attorneys for the plaintiff-intervenor The Chamber of Commerce of the United States of America concerning scheduling deposition of Messrs. Armand J. Thieblot, Jr., Ronald M. Cowin, and Herbert R. Northrup during the week of April 14, 1975 in both the *Grinnell* case and *Dow* v. *Taylor*, C. A. No. 38644 (E.D. Mich.). Affidavits of these individuals had previously been filed by the Chamber on behalf of its position in the *Dow* case. It was determined that only Mr. Cowin would be available during that week, and his deposition was scheduled for April 18, 1975, in Chicago, Illinois.

2. During the week of March 31, 1975, I telephoned George M. Vetter, Jr., counsel for plaintiff Grinnell Corporation, to discuss scheduling of the depositions of Messrs. Northrup, Thieblot and Cowin. During our conversation, Mr. Vetter raised a question of the propriety under the Federal Rules of Civil Procedure of any of these individuals being deposed because they were experts, and I disagreed with his interpretation of the Rules. Mr. Cowin's deposition was properly noticed in the *Grinnell* case and in the *Dow* case, and a copy of the Notice in *Grinnell* was served upon Mr. Vetter on April 9, 1975.

3. On April 16, 1975, and on April 17, 1975, Mr. Vetter and I had telephone conversations during which Mr. Vetter requested that the Cowin deposition be cancelled in order to permit him to obtain judicial resolution of his objections. During those conversations, I made it clear that the Steelworkers' purpose in deposing Cowin and the other two individuals was limited to discovering the background and details concerning the study which he co-authored with Mr. Thieblot and which is known as Report No. 6, "Welfare and Strikes: The Use of Public Funds to Support Strikers"; that the deposition would not be used to attempt to discover Mr. Cowin's present expert opinion; and that cancellation was impractical

because the deponent and the other attorneys involved in the *Grinnell* and *Dow* cases were prepared to go ahead with the deposition as scheduled. However, on April 17, 1975, I agreed to cancel the Cowin deposition.

4. On April 30, 1975, Notices were served in both *Dow* and *Grinnell* rescheduling the depositions of Messrs. Northrup, Thieblot and Cowin to May 29, May 30, and June 11, 1975, respectively. Mr. Vetter was consulted beforehand.

5. During the week of May 12, 1975, Mr. Vetter and I had telephone conversations concerning the rescheduled depositions. Mr. Vetter informed me that before the end of that week he would be filing a motion for a protective order relative to these depositions. During those conversations and prior to the filing of the motion, I emphasized that it was the Steelworkers' position that the motion was unwarranted because the depositions of Messrs. Cowin, Thieblot and Northrup would be strictly limited to discovering the background and details concerning Report No. 6, and because the depositions would not be used to attempt to discover any present expert opinion those individuals may now possess which has been developed in anticipation of litigation.

6. Subpoenas *duces tecum* designating the same material set forth in the respective notices of deposition have been served or will be served upon Messrs. Northrup, Thieblot and Cowin. However, because Mr. Cowin will be unavailable on June 11, 1975, his deposition is in the process of being rescheduled to Wednesday June 18, 1975.

RUDOLPH L. MILASICH, JR.

United States District Court
District of Rhode Island

GRINNELL CORPORATION,
PLAINTIFF

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATIVE SERVICES OF THE STATE OF RHODE ISLAND,
DEFENDANTS

C.A. No. 4926

AND

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GREATER PROVIDENCE CHAMBER OF COMMERCE,
PLAINTIFFS-INTERVENORS,

AND

THE UNITED STEELWORKERS OF AMERICA,
DEFENDANT-INTERVENOR.

Order.

A motion for a protective order against taking the depositions of Dr. Herbert R. Northrup, Armand J. Thieblot, Jr.,

and Ronald M. Cowin, having been made and counsel having been heard in support of and against the motion, it is hereby

ORDERED THAT:

(1) The aforesaid witnesses are expressly found by the court to be expert witnesses, and not actors, and

(2) The motion for protective order is granted, and the depositions of those witnesses shall not go forward, without prejudice, however, to a motion by The United Steelworkers of America under Rule 26(b)(4)(B) for permission to depose these witnesses.

J. HAGOPIAN
United States Magistrate

Enter: May 28, 1975

United States District Court
District of Rhode Island

[Caption omitted in printing.]

Affidavit.

HERBERT R. NORTHRUP, being duly sworn, says:

1. I am and have been since 1961 Professor of Industry of The Wharton School of Finance and Commerce of the University of Pennsylvania. Since 1964, I have been Director of the Industrial Relations Unit at the school, and since 1968, Chairman of the Labor Relations Council. From 1964 to 1969, I was Chairman of the Department of Industry. I am co-author of Economics of Labor Relations, the leading and most popular textbook in the field.

2. I submit this affidavit in opposition to the attempt of the United Steelworkers of America to take my deposition on the grounds that it would violate my rights of free speech and academic freedom under the First Amendment to the United States Constitution.

3. The Steelworkers' purpose in seeking to take my deposition is the latest step in a continuing effort to intimidate me, The Wharton School and the University of Pennsylvania, and scholars here and scholars in general, from studying and conducting research into union policies such as those involved in this case and from publishing the results; to coerce me, The Wharton School, and the University of Pennsylvania, and other institutions, to limit my academic activities and those of other scholars; and failing the attempts to suppress it (see *infra*), to paint as biased and unscholarly Report No. 6 entitled *Welfare and Strikes, The Use of Public Funds to Support Strikers* by Armand J. Thieblot, Jr. and Ronald W. Cowin with a foreword by me and published by the Industrial Research Unit of The Wharton School of Finance and Commerce.

4. As I see it, the purpose of the Steelworkers in seeking to take the deposition of Thieblot and Cowin is the same.

5. The Industrial Research Unit has been in existence since 1921. It conducts studies into vital areas of American industry. It has gained a nationwide reputation for its objective and candid investigating of and reporting on controversial subjects. At times unions and industry have not welcomed the light shed on some of the subjects. Exhibit A lists the studies currently in publication.

6. In 1968 the Industrial Research Unit inaugurated its labor relations and public policy monographs as a means of examining issues and stimulating discussions in the complex

and controversial areas of collective bargaining and the relation of labor/management disputes. Report No. 6, *Welfare and Strikes*, is part of this series.

7. Since publication of *Welfare and Strikes* in May 1972, I have been the subject of harassment, intimidation, and coercion.

(a) On August 10, 1972, I received a letter from Thomas S. Foley, Chairman of the Agricultural Committee of the United States House of Representatives. At that time the Committee was deeply involved in the problem of food stamps. Foley did not ask about the substance of the study but rather for the names of contributors to the study. I told him that the Industrial Research Unit would shortly publish a document summarizing its activities over the years and which would indicate contributors. A copy of this letter is attached as exhibit B.

(b) On August 4, 1972, Richard Clelland, Acting Dean of The Wharton School, received a letter from Emil Mazey, Secretary-Treasurer of the United Automobile Workers, demanding that the book be submitted to a faculty committee for approval. The Dean read the book, stated that it was scholarly, and that at any event there was no such faculty committee. A copy of Mazey's letter and Dean Clelland's replies of August 22 and September 27, 1972, are attached as exhibits C, D and E.

(c) In September 1973, the Labor Relations Council of The Wharton School had invited Lloyd A. Haskins, General-Secretary of the International Federation of Petroleum and Chemical Workers to address a meeting. Just after Labor Day, Haskins telegraphed that he would not come. I telephoned to ask him why. He said in substance that the AFL-CIO had ordered him not to come; that they had been in touch with another professor at the University of Pennsylvania who in turn had gotten in touch with Leo Perlis; that he,

Haskins, had remonstrated with AFL-CIO officials in Washington about this restraint but that he got nowhere; that if he did not obey these orders, he would lose union financing for his organization; and that he had been told that any labor person was being blackballed from coming to my organization. A copy of the Haskins letter to me of September 27, 1973 is attached as exhibit F.

(d) Leo Perlis, Director of the AFL-CIO Department of Community Services (the arm organizing efforts to obtain public support for strikers), wrote me on May 4, 1973, asking for the names of corporations and industrial foundations, if any, that funded the report. I sent him a copy of the summary of activities. He replied in a letter of May 29, 1973, asking "what corporations and industrial funds *specifically* financed" the report. Copies of these letters and the summary are attached as exhibits G, H and I.

(e) On May 11, 1973, Perlis wrote to Martin Meyerson, President of the University of Pennsylvania, attacking the report, stating that the University had been exploited, and demanding an investigation. This letter is attached as exhibit J, and his reply of May 30, 1973 attached as exhibit K. President Meyerson, among other things, told Perlis that the University had to represent and take a variety of points of view, that, for example, Perlis himself had been invited to speak at the 50th annual conference of the Industrial Research Unit, that the speech of the substitute he sent was published by the Industrial Research Unit, and that Professor William Gomberg, a former union official, was on the staff of The Wharton School. Perlis replied to the President in a remarkable letter of June 5, 1973, attached as exhibit L.

(f) In its October 1973 edition, The Readers Digest had an article entitled Lets Stop Subsidizing Strikes. I understand that Perlis demanded that the Readers Digest give him "equal time," and prepared a speech attacking the Readers Digest

article and the book which became the basis of articles in a number of labor publications.

8. The Steelworkers are the largest member union of the AFL-CIO. I. W. Abel, the Steelworkers' president, is head of the Industrial Union section of the AFL-CIO. There is absolutely no doubt that high union figures like Abel, Perlis, Mazey, and others discuss matters affecting the AFL-CIO, the various unions, and the union movement. I know that these men and the unions do not want union use of public benefits to support strikers exposed or studied any more than they want the practice stopped.

9. I was not consulted about my deposition being taken. No attorney for the Chamber of Commerce had any authority express or implied to consent to it. When I found out that the Steelworkers noticed my deposition, I instantly fitted it into the pattern of harassment, intimidation and coercion. I retained George Vetter as my personal counsel to resist by all legal means, including if necessary a plenary suit, these attempts (including the attempt to use court processes) to violate my rights of free speech and academic freedom.

HERBERT R. NORTHRUP

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SPECIAL (PREPAID ONLY) COMBINATION PRICE $50.00

These volumes bring together 24 of the Racial Policies of American Industry monographs, comparing and contrasting the black employment situation in related industries. Widely heralded for their scholarship, fact gathering, incisive analysis, and clear writing, they form the factual and analytic basis for understanding the employment problems of Negros. ". . . a notable contribution. Together the series will represent our most thorough study of the present state of American black employment patterns." MONTHLY LABOR REVIEW, February 1971.

Please send me the following books:

	List Price	Special Prepaid Only Price
1974 PUBLICATION		
____Vol. VII. Negro Employment in the Maritime Industries: A Study of Racial Policies in the Shipbuilding, Longshore, and Offshore Maritime Industries, by Lester Rubin, William S. Swift, and Herbert R. Northrup. 550 pp. 1974. A study of rising black employment and accompanying problems in three unique industries	$12.00	$10.00

	List Price	Special Prepaid Only Price
PREVIOUSLY RELEASED		
____Vol. I. Negro Employment in Basic Industry: A Study of Racial Policies in Six Industries (Automobile, Aerospace, Steel, Rubber Tire, Petroleum, and Chemicals), by Herbert R. Northrup, Richard L. Rowan and others. 800 pp. 1970. ". . . by far the most analytical volume available today . . . well written and factual . . . highly recommended . . ." JOURNAL OF ECONOMIC LITERATURE, March 1972.	15.00	10.00
____Vol II. Negro Employment in Finance: A Study of Racial Policies in Banking and Insurance, by Armand J. Thieblot, Jr. and Linda P. Fletcher. 400 pp. 1970.	9.50	5.00
____Vol. III. Negro Employment in Public Utilities: A Study of Racial Policies in the Electric Power, Gas, and Telephone Industries, by Bernard E. Anderson. 270 pp. 1970.	8.50	5.00
____Vol. IV. Negro Employment in Southern Industry: A Study of Racial Policies in the Paper, Lumber, Tobacco, Coal Mining, and Textile Industries, by Herbert R.		

	List Price	Special Prepaid Only Price
Northrup, Richard L. Rowan, and others. 700 pp. 1971.	13.50	6.00
____Vol. V. Negro Employment in Land and Air Transport: A Study of Racial Policies in the Railroad, Air Transport, Trucking, and Urban Transit Industries, by Herbert R. Northrup and others. 688 pp. 1971. ". . . factual and well written . . . the data are reliable and their treatment is lucid . . . highly recommended . . ." MONTHLY LABOR REVIEW, July 1974.	13.50	6.00
____Vol. VI. Negro Employment in Retail Trade: A Study of Racial Policies in the Department Store, Drugstore, and Supermarket Industries, by Gordon F. Bloom, F. Marion Fletcher, and Charles R. Perry. 560 pp. 1972. ". . . valuable addition to the literature . . . it should be required reading for social scientists and public policymakers . . ." MONTHLY LABOR REVIEW, July 1974.	12.00	10.00
All Seven Prepaid Only		$50.00

NOTE: For those who desire a complete set of Racial Policies of American Industry Reports through No. 31, order

the seven volumes of the Studies of Negro Employment, plus Racial Policies of American Industry Reports No. 4 (Hotels); 12 (Meat); 21 (Drug Manufacturing); 26 (Farm Equipment and Construction Machinery); 27 (Electrical Manufacturing); 28 (Furniture); and 31 (Apparel). These seven reports listed at $36.75 are available at a special prepaid combination price of $25.00 or $75.00 for the seven volumes plus the seven monographs.

Seven Racial Policies Studies	$36.75
Seven Racial Policies Studies Special Prepaid Price	$25.00
Seven Volumes Plus Seven Racial Policies Studies	$75.00

INDUSTRY STUDIES

Please send me the following books: APPAREL, TEXTILE, AND CARPET	List Price	Special Prepaid Only Price
____The Economics of Carpeting and Resilient Flooring: An Evaluation and Comparison, by George M. Parks. 1966.	$ 2.95	$ 2.50
____The Carpet Industry: Present Status and Future Prospects, by Robert W. Kirk. 1970.	5.95	4.00
____The Negro in the Textile Industry, by Richard L. Rowan. 1971.	5.95	4.00

	List Price	Special Prepaid Only Price
____The Negro in the Apparel Industry, by Elaine Gale Wrong. 1974.	5.95	5.00
All Four of Above	$20.80	
Special Prepaid Combined Price		$12.00
PAPER, FURNITURE, AND WOOD PRODUCTS		
The Negro in the Paper Industry, by Herbert R. Northrup. 1969. The Negro in the Lumber Industry, by John C. Howard. 1970.		
____Both in Volume IV, Studies of Negro Employment	13.50	6.00
____The Negro in the Furniture Industry, by William E. Fulmer, 1973.	5.95	4.00
____Educating the Employed Disadvantaged for Upgrading: A Report on Remedial Education Programs in the Paper Industry, by Richard L. Rowan and Herbert R. Northrup. 1972. An analysis of remedial training at Union Camp, Crown Zellerbach, Georgia Kraft, Continental Can, and Boise Southern.	5.95	5.00
All Four of Above	$23.40	
Special Prepaid Combined Price		$13.00
SUPERMARKET		
____Restrictive Labor Practices in the Supermarket Industry, by Herbert R. Northrup.	7.50	4.00

	List Price	Special Prepaid Only Price
____The Negro in the Supermarket Industry, by Gordon F. Bloom and F. Marion Fletcher.	5.95	4.00
Both of Above	$13.45	
Special Prepaid Combined Price		$ 6.00
DRUG MANUFACTURING AND DRUGSTORES		
Three books by F. Marion Fletcher:		
____Market Restraints in the Retail Drug Industry. 1967.	10.00	5.00
____The Negro in the Drug Manufacturing Industry. 1970.	5.95	4.00
____The Negro in the Drugstore Industry. 1971.	5.95	4.00
All Three of Above	$21.80	
Special Prepaid Combined Price		$10.00
BUILDING CONSTRUCTION		
1974 PUBLICATIONS		
____The Davis-Bacon Act, by Armand J. Thieblot, Jr. November 1974. A analysis of the prevailing wage law. Includes summary of questionnaire sent to 5,000 contractors.	6.95	6.00
____Manpower in Homebuilding: A Preliminary Analysis, by Howard G. Foster. 1974. A study of how largely open shop housing contractors recruit, train, compensate, and organize manpower.	6.95	6.00

	List Price	Special Prepaid Only Price
PREVIOUSLY RELEASED		
____The NLRB and Secondary Boycotts, by Ralph M. Dereshinsky. 1972. A critical analysis of the NLRB and court cases in this key construction area.	5.95	5.00
____Opening the Skilled Construction Trades to Blacks: A Study of the Washington and Indianapolis Plans for Minority Employment, by Richard L. Rowan and Lester Rubin. 1972. The only existing in depth, objective study of these of government plans to expand minority employment.	5.95	5.00
All Four of Above	$25.80	
Special Prepaid Combined Price		$20.00

Exhibit B.

September 5, 1972

Hon. Thomas S. Foley
House Office Building
House of Representatives
Washington, D.C. 20515

Dear Congressman Foley:

Your letter of August 10, 1972 arrived when I was away from the office. Please accept my apologies for the delay in replying.

Each year the Industrial Research Unit receives unrestricted grants from companies and industrial foundations for research in industrial relations. These funds are in addition to the larger amounts which have been received from the Ford Foundation and government agencies for specific use on designated research projects. Such unrestricted funds are similarly received by many university research institutes throughout the country.

As Director of the Industrial Research Unit, I determine, in collaboration with my academic colleagues, what funds are to be utilized for which research projects. The *Welfare and Strikes* study was begun, as stated in the book's foreword, like most others in the attached brochure, because it was considered to be a significant area in industrial relations concerning which little was known. The key questions for which answers were sought were posed by the U.S. Court of Appeals, First Circuit, also as noted in the book's foreword. The resultant study is a carefully researched one, the conclusions of which, again as stated in the foreword, are solely the responsibility of the authors.

Since the study must stand on its own merits; since the funds which supported it were allocated by me as Director of the Industrial Research Unit from various grants; and since the source of the funds provided by the Industrial Research Unit to support the study has never been, and is not today, known to the authors, no useful purpose would be served by listing the grantors. Later this fall, however, we plan to publish a booklet summarizing the 51-year history of the Industrial Research Unit and its work, which President Nixon praised by letter read by Secretary of Labor James D. Hodgson, at our 50th Anniversary Conference in November 1971. This booklet will list all contributors to the Unit, and I shall be pleased to send you a copy with my compliments.

Sincerely yours,

HERBERT R. NORTHRUP

Exhibit C.

August 4, 1972

Richard Clelland, Acting Dean
The Wharton School of Finance and Commerce
University of Pennsylvania
Philadelphia, PA 19104

Dear Dean Clelland:

I am writing concerning the report of the Industrial Research Unit entitled "Welfare and Strikes."

The foreword to this report states that it "was financed by a fund for general Industrial Research Unit research donated by four industrial foundations and thirteen companies" — none of which are identified. I am writing to request the names of those foundations and companies.

I think it likely that the blatant bias and propagandistic nature of the document in question has been called to your attention by persons other than myself. It seems to me that it is in direct conflict with sound academic tradition to lend the name of a university to such a publication. Even if it were less biased, I can see no justification for keeping secret the names of those who financed such a report when it is clearly directed to serving the interests of those who paid for it.

If there is any doubt as to whose interests the study serves, it should be laid to rest by the fact that the *Daily Labor Report*, published by the Bureau of National Affairs, says:

> "Hill and Knowlton, Inc., public relations firm in New York and Washington, is distributing the report to the press for the Labor Law Study Committee, a group of

employer representatives and attorneys described as having the objective of bringing attention to 'abuses and inequities in labor laws' and trying to correct them."

The Labor Law Study Committee, as you may know, would tend to view as "abuses and inequities" anything at all that might be helpful to workers.

The circumstances surrounding the report in question are clearly distinguishable from a situation in which a philanthropist who wishes to remain anonymous makes a gift to a university with no strings attached. In this case the donors to the Industrial Research Unit must certainly be aware of the biases of the director of that Unit as manifested by his past activities and connections. And it is certainly within the realm of possibility that one or more of the donors may have proposed the specific study in question since the subject matter is currently being raised as a legislative issue by industry.

I should also like to request the names of the members of the Academic Review Committee for the study. I am advised that such a committee is established for all studies published under the sponsorship of the University of Pennsylvania. It seems reasonable to assume that those who thought enough of the study to approve its publication will have no reluctance to reveal their roles in connection with it.

I am looking forward to your reply.

Yours very truly,

EMIL MAZEY
Secretary-Treasurer

Exhibit D.

August 22, 1972

Mr. Emil Mazey
Secretary-Treasurer, U.A.W.
8000 East Jefferson Avenue
Detroit, Michigan 48214

Dear Mr. Mazey:

This is to acknowledge receipt of your letter of August 4, 1972 concerning the volume "Welfare and Strikes." It was on my desk when I recently returned to Philadelphia. I think that, before I reply formally, I should reread "Welfare and Strikes" in detail. Your letter raises various interesting questions, and I would like to refresh my memory as to its contents.

Sincerely,

RICHARD C. CLELLAND
Acting Dean

Exhibit E.

September 27, 1972

Mr. Emil Mazey
Secretary-Treasurer, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214

Dear Mr. Mazey:

I have now reread the report entitled "Welfare and Strikes" prepared by the Industrial Research Unit. It seems to be a reasonable research effort informed by a conservative philosophy. I have looked into the several matters of University policy that relate to your questions.

1) There is no question of secrecy as regards the names of the funding sources for the report. You must realize, however, that no funds were appropriated to the IRU specifically to finance the study that resulted in the report. Rather, the study was funded by monies given to support the work of the IRU generally. Dr. Northrup is presently preparing a document for general distribution that includes a discussion of IRU's sources of funding, and he will be glad to send you copies of this document when it is issued — presumably in November or December of 1972.

2) Research at the University of Pennsylvania does not in general pass through an Academic Review Committee prior to publication. Proposals of this sort were formulated several years ago, but these have never been implemented.

I hope that these remarks will be helpful to you.

Yours truly,

RICHARD C. CLELLAND

Exhibit F.

September 27, 1972

Dr. Herbert R. Northrup, Director
University of Pennsylvania
The Wharton School
Industrial Research Unit
Vance Hall, Third Floor
37th and Spruce Streets
Philadelphia, Pennsylvania 19174

Dear Dr. Northrup:

Thank you so very much for your letter of September 21, 1973, in which you enclosed a translation of the letter from Federchimici. Your translation coincides with the one which one of our staff members made on this letter. The rate of $5.00 per 100 words is the charge made by Berlitz and other outside interpreters for both Arabic and Italian. We have our own translators for the other languages and their regular rate is $3.00 per 100 words. It appears to me that $5.00 per 100 words is excessive but is the going rate on certain languages.

We have talked by telephone with Vernon O'Rourke and he tells us that the conference went very well. I am glad you were able to get him as a replacement for me. Again, let me say that I am extremely sorry that this situation developed.

I will keep you informed if I hear from your colleague.
With my best personal regards, I am

Sincerely,

LOYD A. HASKINS
General Secretary

Exhibit G.

May 4, 1973

Dr. Herbert R. Northrup, Director
Wharton School of Finance and Commerce
University School of Finance and Commerce
University of Pennsylvania
Industrial Research Unit
University City No. 1
4025 Chestnut Street
Philadelphia, Pennsylvania 19104

Dear Dr. Northrup:

I wonder if you could let me have the names of the corporations and industrial foundations, if any, that funded the study made by Dr. Thieblot and Mr. Cowin entitled "Welfare and Strikes."

Sincerely,

LEO PERLIS, Director
Department of Community Services

Exhibit H.

REPORT ON PROGRESS

THE INDUSTRIAL RESEARCH UNIT
1921 - 1972

THE LABOR RELATIONS COUNCIL
1946 - 1972

Together with a Final Report on

The Racial Policies of American Industry

1966 - 1972

funded by the Ford Foundation

The Wharton School
University of Pennsylvania
Philadelphia

[The entire report was attached to Dr. Northrup's Affidavit. Only the section on sources of support are printed here.]

TABLE 5
Nonprofit Institutions and Government Agencies Contributing to the Industrial Research Unit Since 1964

I. *Foundations*
- ACF Foundation
- ALCOA Foundation
- Field Foundation
- Ford Foundation
- General Electric Foundation
- Ittleson Family Foundation
- Rosenthal Foundation
- Standard Oil of Indiana Foundation
- Uniroyal Foundation
- United States Steel Foundation

II. *Other Nonprofit Organizations*
- Chamber of Commerce, Lancaster, Penna.
- Labor Policy Association, Inc.
- National Association of Food Chains
- Opportunities Industrialization Centers, Inc.
- Southeastern Pennsylvania Economic Development Corporation

III. *United States Government Agencies*
- Department of Commerce, Maritime Administration
- Department of Defense, Office of Naval Research
- Department of Housing and Urban Affairs, Urban Planning Board
- Department of Labor, Division of Labor Standards
- Department of Labor, Manpower Administration
- Department of Transportation, Urban Mass Transportation Administration
- Equal Employment Opportunity Commission
- Federal Mediation and Conciliation Service

of Negro employment in construction. Funds are being sought from a variety of sources for these purposes.

SOURCES OF SUPPORT

The Industrial Research Unit obtains support for its work from foundations and other nonprofit institutions, from government, from private industry, and from the sale of publications.

TABLE 6
Company Members of the Research Advisory Group
January 1973

ACF Industries, Inc.	Kimberly-Clark Corporation
Allied Chemical Corporation	McGraw-Edison Company
American Cyanamid Company	Mead Corporation
American Metal Climax, Inc.	3M Company
American Smelting and Refining Co. (ASARCO)	National Gypsum Company
American Standard	NL Industries, Inc.
Armstrong Cork Company	North American Rockwell
Campbell Soup Company	Olin Corporation
Clow Corporation	Owens-Illinois, Inc.
Dart Industries Inc.	Phelps Dodge Corporation
Dow Chemical Company	Rohm and Haas
E. I. du Pont de Nemours & Company, Inc.	Sheller-Globe Corporation
General Electric Company	Square D Company
Globe-Union Inc.	Stauffer Chemical Company
Hercules Incorporated	Sterling Drug Inc.
Humble Oil & Refining Company	Sylvania Electric Products, Inc.
Ingersoll-Rand Company	Union Camp Corporation
International Nickel Company, Inc.	Union Carbide Corporation
International Telephone and Telegraph Corp.	UNIVAC Division, Sperry Rand Corporation
Johns-Manville Corporation	Westinghouse Electric Corp.
Kennecott Copper Corporation	Whirlpool Corporation

In addition, there is a small endowment, the result of a bequest by Dr. Gladys L. Palmer, former Director of the Unit. The distribution of this support from 1966 to 1972 is shown in Figure 1. Foundation support was the leading contributor in

TABLE 7
Companies Exclusive of Research Advisory Group and Labor Relations Council Members Who Have Contributed to the Industrial Research Unit Since 1964

Aldon Industries, Inc.	McDonnell Douglas Corporation
Caterpillar Tractor Company	Mobil Oil Corporation
Deere & Company	RCA, Inc.
Ford Motor Company	Richmond Waterfront Terminals, Inc.
Goodyear Tire & Rubber Co.	St. Regis Paper Company
Johnson & Johnson	United Air Lines Inc.
The Kroger Company	Weyerhaeuser Company
Leeds & Northrup	Whitman's Division, Pet Inc.
Lockheed Aircraft Corporation	

this period, as a result of the large Ford Foundation grant. In the absence of a similarly large grant, the relative significance of the sources of support are likely to vary in the future. Government grants and contracts are made for specific purposes, as are such large foundation grants as the one from Ford, as well as some smaller ones. Many small foundation grants, however, are unrestricted. Table 5 lists foundations, other non-profit institutions, and government agencies which have made grants to the Industrial Research Unit since 1964.

Funds received from the various sources pay for that percentage of faculty salaries which are devoted to research efforts; student fellowships and research assistantships; faculty summer stipends; honoraria for research work by scholars who are not affiliated with the University of Pennsylvania; computer use, telephone service, office supplies, travel, and other related expenses associated with research; and University overhead and employee benefit charges. Foundation and private industry funds have also been utilized to provide scholarships and other assistance for black graduate students. This program was inaugurated prior to the inception of a general Wharton program now in effect, and twelve black students have been assisted by it since 1964. All funds are expended pursuant to budgets approved by the Dean of the Wharton School and the Provost or Associate Provost and the Comptroller of the University.

The Research Advisory Group

In 1967, the Director of the Industrial Research Unit induced a group of company personnel executives to meet with him and other staff members on a regular basis, to discuss areas of concern which might warrant research and to contribute to the Unit's program on a regular and unrestricted basis. The Research Advisory Group was formed, and meets three times a year for all-day sessions. Members cooperate in research, provide access to data, and are generally committed to assist with information required for studies. A list of company members of the Research Advisory Group is set forth in Table 6.

Other Industry Contributions

Over the years, various additional companies have contributed to the Unit's program, some for specific research, others on an unrestrictive basis. Table 7 lists all companies which are members of neither the Research Advisory Group nor the Labor Relations Council but which have made at least one such contribution.

In the future it is hoped to maintain the widest possible fund sources—industry, foundation, and government. By this means, it is believed that the diversity of research interests of the Unit's staff can be maintained and faculty and students can continue to be encouraged to examine new and vital problems.

Exhibit I.

May 29, 1973

Dr. Herbert R. Northrup, Director
Industrial Research Unit
Wharton School of Finance and Commerce
University of Pennsylvania
Philadelphia, Pennsylvania 19104

Dear Dr. Northrup:

Thank you for sending me a copy of your Report on Progress — but what corporations and industrial funds, *specifically*, financed "Welfare and Strikes" by Thieblot and Cowin?

Thank you.

Sincerely,

LEO PERLIS, Director
Department of Community Services

Exhibit J.

May 11, 1973

Mr. Martin Meyerson
President
University of Pennsylvania
101 College Hall
Philadelphia, Pennsylvania 19174

Dear Mr. Meyerson:

A book entitled "Welfare and Strikes," written by Dr. Armand J. Thieblot, Jr. and Mr. Ronald M. Cowin and published by the Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, has been funded by four industrial foundations and thirteen companies.

This book is replete with misconceptions, misinformation and questionable representations.

This book is being used by the United States Chamber of Commerce and the National Association of Manufactures to rationalize their long standing campaigns against the use of public assistance in any form for families of striking workers, children and wives included, no matter how needy and whether or not they meet all other eligibility requirements.

This book, because it is wrapped in a cloak of respectability provided by the University of Pennsylvania Press and the Wharton School of Finance and Commerce, is being disseminated, promoted and quoted widely by the Chamber of Commerce and the National Association of Manufacturers in their public relations campaigns to deny public assistance to needy families of striking workers.

It would appear to me that the good name of the University of Pennsylvania is being exploited to cover a brutal campaign against needy people.

I think it would be helpful all around if an investigation were made of the background behind the publication of this book. Who commissioned it? Who, specifically, paid for it? Who bought copies of it? Who distributed it? Who selected the authors and on what basis?

While I am completely for academic freedom and do not wish to exercise censorship in any form, I believe that the people are entitled to the truth, the complete truth, behind the publication of a book which is being disseminated, promoted and quoted widely by self serving organizations.

Our position on public assistance for needy families of striking workers is expressed in the enclosed materials.

With all good wishes,

Sincerely,

LEO PERLIS, Director
Department of Community Services

Exhibit K.

May 30, 1973

Mr. Leo Perlis, Director
Department of Community Services
American Federation of Labor and
Congress of Industrial Organizations
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Perlis:

This will acknowledge receipt of your letter of May 11, 1973. I regret that commencement and the rush of other duties have precluded a reply until now.

I cannot agree with your view that the Wharton School or the University of Pennsylvania should censor or suppress the book, *Welfare and Strikes*. It does, however, present the results of the first field study of the subject and great care was taken to solicit the views of all parties, including those of organized labor and of you personally. Moreover, these views were faithfully recorded in the study. The fact that the authors disagree with your views, and in fact agree with those expressed by some management organizations, provide no more grounds for condemning the book than if the reverse were true.

A great University must give free rein for the presentation of all viewpoints on controversial subjects. Thus you were invited to present your views at the 50th Anniversary Conference of the Industrial Research Unit, November 1971. When a conflict prevented your appearance, you sent, at Professor Herbert R. Northrup's personal request, Mr. Ray

Andrus. The latter's remarks were included in the publication of the Conference Proceedings, *Collective Bargaining: Survival in the '70's*, which was published by the Industrial Research Unit in the same series as was *Welfare and Strikes*. Dr. Northrup advises me that he regularly assigns both Mr. Andrus' remarks and papers by you in his industrial relations public policy course to insure a balanced reading for the students.

A great University also requires a faculty with varying viewpoints. Dr. Northrup, a distinguished scholar for 30 years, spent part of his work life in industry. His colleague, Professor William Gomberg was a trade union official for a much longer period. Our students are urged to take courses from both to enrich their experiences and to be exposed to the varying viewpoints that are so necessary for educated citizens.

As for your specific comments, I can advise you that each year the Industrial Research Unit receives unrestricted grants from companies and industrial foundations for research in industrial relations. These funds are in addition to the larger amounts which have been received from the Ford Foundation and governmental agencies for specific use on designated research projects. Such unrestricted funds are similarly received by many university institutes throughout the country.

As Director of the Industrial Research Unit, Dr. Northrup determines, in collaboration with his academic colleagues, what funds are to be utilized for which research projects. The *Welfare and Strikes* study was begun, as stated in the book's foreword, like most others in the attached brochure, because it was considered to be a significant area in industrial relations concerning which little was known. The key questions for which answers were sought were posed by the U.S. Court of Appeals, First Circuit, also as noted in the book's foreword.

The resultant study is a carefully researched one, the conclusions of which, again as stated in the foreword, are solely the responsibility of the authors.

Since the study must stand on its own merits; since the funds which supported it were allocated by the Director of the Industrial Research Unit from various grants; and since the source of the funds provided by the Industrial Research Unit to support the study has never been, and is not today, known to the authors, no useful purpose would be served by listing the grantors.

I understand that Dr. Northrup has already sent you a copy of the booklet summarizing the 51 year history of the Industrial Research Unit which explains its workings and finances.

Sincerely yours,

MARTIN MEYERSON

Exhibit L.

June 5, 1973

Mr. Martin Meyerson
President
University of Pennsylvania
101 College Hall
Philadelphia, Pennsylvania 19174

Dear Mr. Meyerson:

I have your letter of May 30.

You say that you "cannot agree with (my) view that the Wharton School or the University of Pennsylvania should censor or suppress the book, "Welfare and Strikes."

I cannot believe that you read my letter of May 11.

If you will read my letter of May 11, you will note that I wrote that "I am completely for academic freedom and do not wish to exercise censorship in any form . . ."

It comes with ill grace, therefore, for you to charge me with the desire to "censor or suppress" the Thieblot-Cowin book. I take it that this silly charge is simply a diversionary attempt on your part.

One need not belabor the point that there is a vast difference between censorship and coverup. What I am asking for is neither censorship nor coverup. I am pleased to know that you are against censorship, but it would be helpful also to know that you are against coverup.

The book, I agree, must stand on its merits. But what it says or what it doesn't say on a highly controversial public issue of major importance is not only a question of merit but also of motivation. Who inspired it and why? Who paid for it

and why? Who buys it and why? Who distributes it and why? Who quotes it and why? These questions — in context of comprehensive criticism — are as relevant as whether or not the facts, the evaluation of the facts and the conclusions have any basis in fact — which, of course, they don't.

A great university must give free rein for the presentation of all viewpoints on controversial subjects, but a great university must not permit self-serving organizations to use it as a cloak of respectability for their own self-serving campaigns. The people who read the University of Pennsylvania book, *Welfare and Strikes*, including Senators, Congressmen, editorial writers and other influential leaders, are entitled to know — among other questions — what corporations paid for it.

Do you really believe that the truth about how a book was inspired, sponsored, paid for and distributed is tantamount to its suppression? I don't. On the contrary, I would call it enlightenment.

You drag Mr. Andrus, Dr. Gomberg and me into something for which neither Mr. Andrus nor I have any responsibility. Andrus and I had nothing to do with your book. And as for Dr. Gomberg, he can speak for himself.

We don't condemn the book because some management organizations share the same views as the authors. Nor do we condemn the authors for sharing the Chamber's misconceptions. As a matter of fact, we don't even condemn the University of Pennsylvania for publishing this brutal book. That is its right — but we do resent your crying "censorship and suppression" when the sponsorship and accuracy of the book are questioned. You must admit there is a difference between burning a book and exposing a book. In case you've forgotten, burning a book is the Nazi way, and exposing a book is the American way. But protecting a book is something else

again. Certainly, I can't believe that protecting a book is the way of academic freedom — which you seem to invoke at the drop of a protest.

I raised a number of questions in my letter of May 11 which still remain unanswered.

The people are entitled to know what corporations paid for the book and what part did the Chamber of Commerce and the National Association of Manufactures play in its conception and distribution. This is particularly important in the face of the constant reference by the Chamber and its fellow-travelers to "The University of Pennsylvania study."

Sincerely,

LEO PERLIS, Director
Department of Community Services

United States District Court
District of Rhode Island

GRINNELL CORPORATION,
PLAINTIFF

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATIVE SERVICES OF THE STATE OF RHODE ISLAND,
DEFENDANTS,

C.A. No. 4926

AND

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GREATER PROVIDENCE CHAMBER OF COMMERCE,
PLAINTIFFS-INTERVENORS,

AND

THE UNITED STEELWORKERS OF AMERICA, A.F.L.-C.I.O.,
DEFENDANT-INTERVENOR.

Memorandum and Order.

The defendant-intervenor, United Steelworkers of America, AFL-CIO, having moved for reargument of the protective order against them entered May 28, 1975, or in the alternative,

under rule 26(b)(4)(B), to depose the expert witnesses, Dr. Herbert R. Northrup, Professor Ronald M. Cowin, and Professor Armand J. Thieblot, Jr.,

Now, upon all of the materials submitted by the parties, and upon the oral argument in open court on June 17, 1975, the court hereby finds:

1. That the United Steelworkers of America, AFL-CIO, have not made any showing of exceptional circumstances under which it would not be practicable for them to obtain facts or opinions on the same subject matter by other means;

2. That it is more likely than not that if the court allowed the depositions sought by The United Steelworkers to be taken, especially in light of the affidavit of Herbert R. Northrup of June 13, 1975 and Exhibits A through L attached, the deponents would be visited with the very evils of annoyance, embarrassment, oppression and undue burden or expense which rule 26(c) is designed to guard against, and not to apply the protections of that rule by analogy would result in a manifest injustice to these deponents; and

3. That the purpose of The United Steelworkers in attempting to take these depositions has every appearance of, and from the standpoint of the deponents it is more probable than not that that purpose is, pursuing a private purpose and not a purpose of the litigation; so that to allow the depositions would be a shocking exploitation of the judicial process; accordingly it is

ORDERED that the motion of The United Steelworkers for reconsideration of the protective order entered May 28, 1975 is hereby denied, and the motion of The United Steelworkers to take the depositions of Dr. Herbert R. Northrup, Professor Ronald M. Cowin, and Professor Armand J. Thieblot, Jr. is hereby denied.

J. HAGOPIAN
United States Magistrate
ENTER: July 3, 1975

United States District Court For The District of Rhode Island

GRINNELL CORPORATION

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF THE STATE OF RHODE ISLAND

Opinion and Order.

PETTINE, C.J. The plaintiff Grinnell Corporation initiated this case in May of 1972 to challenge the payment by the defendants of unemployment benefits to striking employees as required by the Rhode Island Employment Security Act, R.I.G.L. sec. 28-42-1 *et seq.*, alleging that these payments deprived Grinnell of its federal right to engage in collective bargaining without the interference of state subsidies to striking employees. The travel of the case has been long and complicated and need not be reviewed here. The matters presently before this court are the motion of the defendant intervenor United Steelworkers of America for *de novo* review by this court of the magistrate's order denying reconsideration of entry of a protective order and denying judicial leave to

take certain depositions, and the motions of the plaintiff and the three persons whose depositions are sought to dismiss the Steelworkers' motion as untimely and alternatively to strike the Steelworkers' motion insofar as it seeks review *de novo*.

I

Shortly after this case was commenced in 1972, this court heard the plaintiff's motion for a preliminary injunction. At that hearing Armand J. [Thieblot], Jr. and Ronald M. Cowin testified as expert witnesses for Grinnell on the impact of the payment of unemployment compensation benefits to strikers. Both men had been associated with the Industrial Research Unit of the Wharton School of Finance and Commerce of the University of Pennsylvania and were experts by virtue of a study conducted by them beginning in 1970 and published in April, 1972 by the Industrial Research Unit as Report No. 6, entitled *Welfare and Strikers: The Use of Public Funds to Support Strikers*. This study was introduced as an exhibit by Grinnell. Also introduced by Grinnell was an affidavit of Dr. Herbert R. Northrup, Director of the Industrial Research Unit, expressing his expert opinion on the same topic.

In the spring of 1975, after extensive proceedings in this case that included the appeal of several issues to the Court of Appeals for the First Circuit, the Steelworkers noticed the depositions of [Thieblot], Cowin, and Northrup and had served upon them subpoenas *duces tecum*. Grinnell moved for a protective order, and on May 23, 1975, the United States Magistrate heard the motion under § 13(b)(6) of the Standing Order of this Court for the Utilization of United States Magistrates and granted the protective order from the bench. The magistrate found that the deponents were experts and not actors in the events giving rise to the strike and accordingly

that the Steelworkers could not depose them as of right, although he gave the Steelworkers leave to make a showing of exceptional circumstances under Rule 26(b)(4)(B) of the Fed. R. Civ. P.[1]

The Steelworkers moved before the magistrate for reconsideration of the protective order and, in the alternative, for permission to depose the three men as experts under Rule 26(b)(4)(B). The magistrate heard these motions on June 17, 1975, and from the bench denied reconsideration of the protective order, ruled that the Steelworkers had failed to make a showing of exceptional circumstances under Rule 26(b)(4)(B), and found as a fact that "it is more probable than not" that in seeking these depositions the Steelworkers were carrying out a private purpose and not a purpose of the litigation. The magistrate's written order was filed on July 3, 1975, and the Steelworkers filed their motion for *de novo* reconsideration on July 11.

II

Grinnell and the three deponents raise two procedural objections to the Steelworkers' appeal from the magistrate's order. They argue that the Steelworkers' motion was not timely filed and alternatively that review by this Court cannot be *de novo*.

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[1] Rule 26(b)(4)(B) provides:

> "a party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 36(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

Sec. 13.1 of this Court's Standing Order for the Utilization of United States Magistrates, as amended on April 30, 1973, provides as follows:

> "13.1 *Reconsideration of Magistrate's Ruling by District Judge.*
>
> A magistrate's ruling on a motion, not incident to the exercise of his trial jurisdiction, shall be final and conclusive unless a party thereto moves for reconsideration by a district judge. A motion for reconsideration shall be made within (5) days of the magistrate's ruling. Reconsideration shall not be *de novo* but shall be the same as an appeal on a question of law."

Grinnell and the deponents are clearly correct in their contention that review of the magistrate's order cannot be *de novo*. The Steelworkers' motion shall therefore be construed as one for reconsideration of the magistrate's order in a manner not inconsistent with § 13.1 of the Standing Order.

Grinnell and the deponents are also correct that the Steelworkers' motion was filed more than (5) days after the magistrate's order was filed. The magistrate's order was filed on July 3, 1975, and the Steelworkers' motion on July 11. Computations of time, however, must be made in accordance with Rule 6(a) of the Fed. R. Civ. P., which provides in part, "when the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Furthermore, "the day of the act, event, or default from which the designated period of time begins to run shall not be included." In computing the five day period in this case, July 3 is excluded as the day of the triggering event, the magistrate's filing; July 4 is excluded as a legal holiday; and July 5 and 6 are excluded

because they fell on a Saturday and Sunday. Thus, the 5 day period actually began on July 7, and since the Steelworkers filed their motion on July 11, the fifth day, the motion was timely filed.

Grinnell and the deponents contend in the alternative that the five day period for filing the motion to reconsider should begin to run on the day after the magistrate issued his ruling from the bench, June 17, rather than on the day after the written order was filed, July 3. Such a construction of § 13.1 of the Standing Order would be inconsistent with Local Rule 23(c), however, which provides that absent certain circumstances which are not present in this case, all orders orally announced in open court shall be prepared in writing and entered into the official record.[2] The delay from June 17 to July 3 in entering the written order here does not appear unusually long, particularly since Local Rule 23(c) provides for two five-day periods during which the parties can draft or object to proposed written formulations of orders announced orally, and neither Grinnell nor the deponents have shown that they were in any way materially prejudiced by the delay. Accordingly, the motion to dismiss as untimely the Steel-

[2] Local Rule 23(c) provides:

"Preparation and filing of formal orders. Unless the court otherwise directs, all appealable orders and all other orders orally announced in open court in any cause, shall be prepared in writing by counsel for the successful party and served and lodged with the clerk within five days. No such order will be entered unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to serve and file with the clerk, within five days after service of a copy thereof, as shown by endorsement on the original or by certificate of service, a statement of objections to form and the grounds thereof.

If objections to form or substance are served and filed within the time prescribed herein, the court may thereafter require counsel to appear for a hearing thereon or may sign the document as prepared or as modified."

workers' motion for reconsideration of the magistrate's June 17 ruling is denied.

III

One basis of the Steelworkers' challenge to the magistrate's ruling is that the magistrate misinterpreted and therefore misapplied Rule 26(b)(4) of the Fed. R. Civ. P., concerning the scope of discovery of facts and opinions held by experts. While I have ruled that this Court's review of the magistrate's ruling is not *de novo*, the impact of that decision lies primarily upon review of findings of fact, which must be accepted unless clearly erroneous. *Cf.* Fed. R. Civ. P. 52(a); *DeCosta* v. *Columbia Broadcasting System, Inc.*, 520 F. 2d 499, 509 (1st Cir. 1975). The question immediately at hand, that of interpreting Rule 26(b)(4), is a question of law subject to the "full review" of this Court. *DeCosta, supra*, 520 F. 2d at 509.

Rule 26(b)(4) provides in pertinent part:

> "*Trial Preparation: Experts.*
> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:
> (A) . . .
> (B) . . .[3]

[3] Subdivision (A) provides:

"(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is

The magistrate found as a fact, not disputed by the Steelworkers, that the three deponents Professor [Thieblot], Mr. Cowin and Dr. Northrup, were experts. The Steelworkers contended, however, that they sought to depose these individuals not in their capacity as experts but rather as actors in the preparation of a piece of evidence. The magistrate rejected this contention, finding that the individuals were expert witnesses for the purposes of the depositions sought. Therefore he ruled in accordance with Rule 26(b)(4) that the depositions of these men as experts could not be taken by right under Rule 26(b)(1) but could be taken only if the requirements of Rule 26(b)(4)(A) or (B) were met, which, he found, was not the case here.

It is my conclusion that the magistrate read Rule 26(b)(4) too narrowly. The very words of the rule provide that the restrictions imposed upon the discovery of facts known and opinions held by experts shall be applied only to those facts and opinions "acquired or developed in anticipation of litigation or for trial." It is undisputed that the Steelworkers sought to conduct these depositions solely to obtain background information concerning Report No. 6, *Welfare and Strikes: The Use of Public Funds to Support Strikers.* It is further undisputed that Report No. 6 was not prepared in anticipation of litigation or for trial; rather the report was written in fulfillment of Mr. Cowin's Master's Degree Thesis requirement at the Wharton School of Finance and Commerce at the University of Pennsylvania. Since the information

expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate."

For subdivision (B), *see* n. 1 *supra*.

sought from these experts was not acquired in anticipation of litigation or for trial, Rule 26, as I interpret it, would permit their deposition if the liberal requirements of Rule 26(b)(1)[4] are satisfied without necessitating the satisfaction of the more restrictive requirements of Rule 26(b)(4)(A) or (B).

The magistrate apparently based his ruling on a belief that depositions of experts without first satisfying the requirements of subsection (A) or (B) could be conducted only if the experts were deposed in their capacity of actors and/or witnesses to the events giving rise to the suit. There is no doubt that depositions may be freely taken of experts in these capacities without the permission of the court required by Rule 26(b)(4)(A) and (B). According to the advisory committee on the federal rules,

> "it should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness." Advisory Committee Note, 48 F.R.D. 497, 503. See also *In Re Brown Company Securities Litigation*, 54 F.R.D.

[4] Rule 26(b)(1) provides:

> "*In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

384 (E.D. La. 1972); *Duke Gardens Foundations, Inc.* v. *Universal Restoration, Inc.*, 52 F.R.D. 365 (S.D.N.Y. 1971); Wright and Miller, Federal Practice and Procedure: Civil Sec. 2029 at 250-51.

It is not at all clear, however, that these are the only circumstances under which experts may be deposed without the permission of the court. Nevertheless, in the case at bar the magistrate made a finding of fact, which appeared to be reasonably supported by the evidence that the three deponents were not direct witnesses of nor actors in the events giving use to this lawsuit, i.e. the strike by Grinnell's employees or the payment of unemployment benefits to them by the State. He then concluded, in my view erroneously, that any information they had relevant to the subject matter of this suit could be discovered only through the procedures outlined in Rules 26(b)(4)(A) or (B).

While it is true that the deponents in this case were not witnesses to nor actors in the events giving rise to this litigation, it is equally true that the information sought by the Steelworkers was not acquired or developed in anticipation of litigation or for trial. Whether such information is discoverable without compliance of subsections (A) or (B) is a question apparently never before decided in a published opinion and not addressed by the Advisory Committee on the federal rules or such commentators as Wright and Miller. An examination of the wording of Rule 26, however, and of the policy considerations lying behind this rule concerning both discovery generally and discovery of fact and opinions held by experts leads me to conclude that the Steelworkers need not satisfy the requirements of Rule 26(b)(4)(A) or (B) before taking the depositions in question and need only satisfy the requirement of Rule 26(b)(1).

As mentioned *supra*, Rule 26(b)(4) on its face appears to curtail the discovery of experts only if the information sought was "acquired or developed in anticipation of litigation or for trial." This interpretation is reenforced by the context and placement of this subsection within the general framework of Rule 26. Subsection (b)(2) covering insurance agreements, (b)(3), covering trial preparation: materials, and (b)(4), covering trial preparation: experts, are clearly intended to be exceptions to the general provisions of 26(b)(1) which permit, without court order, discovery of any matter, not privileged, relevant to the subject matter of the pending action. The very inclusion of the words "trial preparation" in the heading of subsection (b)(4) indicates that discovery of experts is to be limited only insofar as the information sought was obtained for the very purpose of preparing for the litigation in question. There is absolutely nothing in the wording of Rule 26 to indicate that facts or opinion held by experts and not acquired for the purpose of preparing for litigation cannot be freely discovered under 26(b)(1) unless the expert is a witness to or actor in an event underlying the litigation.

This reading of Rule 26 is completely consistent with the policies underlying the federal discovery rules. According to the Supreme Court, the purpose of these rules is to provide a way, consistent with recognized privileges, "for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman* v. *Taylor*, 329 U.S. 495, 500 (1947). In general the discovery rules have been liberally construed by the courts. Wright and Miller, *supra*, sec. 2001 at 17. *See*, e.g. *United States* v. *McWhirter*, 376 F. 2d 102, 106 (5th Cir. 1967).

Rule 26(b)(4) was adopted in its present form in 1970 in part to respond to the great disagreements that existed in the courts on the extent to which discovery of expert information was permissible, and it resolved the controversy in favor of

much more liberal discovery than was previously permissible. Wright and Miller, *supra*, sec. 2029. Earlier decisions that held that an expert's information was privileged simply because of his status as an expert or that brought expert information within the work product doctrine were completely repudiated by Rule 26(b)(4). *See* Advisory Committee's Note, 48 F.R.D. 497, 504-05. The basis for any restrictions in Rule 26 on the discovery of information held by experts now lie in the doctrine of "fairness.' *Id.* at 505. Thus, where it would be unfair for one party to learn through discovery what the other party has paid an expert for, the court can order the party seeking discovery to pay the expert a reasonable fee. 26(b)(4)(C). And where it would be unfair to "penalize diligence" and "put a premium on laziness" by permitting a party to obtain information gathered by his adversary's expert in preparation for trial, such discovery can be permitted only upon a showing that it is impracticable for the party seeking discovery to obtain such information by other means. Rule 26(b)(4)(B).

Where, as in the case at bar, the facts or opinions sought were not prepared for litigation or trial, there is little support for a finding that freely permitting discovery would result in any unfairness to the opposing party. The experts in this case were not being paid by Grinnell when they obtained the information sought by the Steelworkers and certainly Mr. Cowin's choice of topic and source of funding for his Masters thesis was in no way a product of Grinnell's diligence in preparing this case.

IV

The depositions sought by the Steelworkers, therefore, may be freely taken under Rule 26(b)(1) so long as the information

sought is not privileged and is relevant to the subject matter of the litigation. No claim has been made that the information sought is privileged. Grinnell and the three deponents do contend, however, that the Steelworkers sought the depositions for a private purpose, that of harrassing the deponent, and not for a purpose of litigation, and the magistrate found it "more probable than not" that this contention was true. As discussed earlier, this review is not *de novo* and I have not referred to any evidentiary material that the magistrate did not have before him. Nevertheless, I must conclude that the magistrate's finding that these depositions were pursued solely for a private purpose is clearly erroneous.

Through their proposed depositions, the Steelworkers hope to discover the facts concerning the inception, initiation, conduct, finalization, financing, and publication of Report No. 6, *Welfare and Strikes: The Use of Public Funds to Support Strikers.* There can be no doubt that this information is relevant to this litigation under the broad standard outlined in Rule 26(b)(1). According to the answers to certain interrogatories served upon Grinnell by the Steelworkers, Report No. 6 is one of Grinnell's most important pieces of evidence in support of certain elements of the case it must prove. Furthermore, Report No. 6 has already been introduced as an exhibit in this case at the hearing on the plaintiff's motion for a preliminary injunction. Certainly the information the Steelworkers sought, which could lead to the discovery of admissible evidence concerning the credibility of Report No. 6 or which could itself constitute such evidence, is relevant to the subject matter involved in the pending action. The magistrate ruled, however, that Grinnell and the deponents were entitled to a protective order under Rule 26(c) to shield them from annoyance, embarrassment, and oppression. Rather than qualify the Steelworkers' right to discovery in one of the less restrictive ways described in Rule 26(c), the

magistrate utilized the most restrictive type of protective order available and ruled flatly that the discovery could not be had. At the outset of reviewing his ruling it should be noted that an order to vacate a notice of taking a deposition is generally regarded by the court as both unusual and unfavorable, and most requests of this kind are denied. *Investment Properties International, Ltd.* v. *Ios, Ltd.*, 459 F. 2d 705, 708 (2d Cir. 1972); Wright and Miller, *supra*, sec. 2037 at 272-75. A showing that the likelihood of harrassment is "more probable than not" is in my view insufficient without a concomitant showing that the information sought was "fully irrelevant and could have no possible bearing on the issues." Wright and Miller, *supra*, sec. 2037 at 275. Grinnell and the deponents have clearly failed to meet their burden. While I am hesitant to conclude as a matter of law that the magistrate's finding of harrassment of the deponents as one of the purposes of the Steel Workers in seeking these depositions was clearly erroneous, I cannot accept his finding that another purpose of these depositions was not to uncover evidence relevant to this litigation. Indeed it would border on malpractice on the part of counsel for the Steelworkers not to seek evidence which could help undermine the credibility of such an important piece of evidence in the plaintiff's case as Report No. 6, and the magistrate was clearly in error to conclude that this was not part of the Steelworkers' motivation in seeking these depositions.

Therefore, it is hereby ORDERED

1. The motion of Grinnell and the three deponents to dismiss as untimely the Steelworkers' motion for reconsideration is denied.

2. The motion of Grinnell and the three deponents to strike the Steelworkers' motion insofar as it seeks *de novo* review is granted.

3. Grinnell's motion to strike the materials submitted to the court by the Steelworkers on November 13, 1975 is granted.

4. The Steelworkers' motion for review of the magistrate's order, as modified by No. 2 *supra*, is granted and the protective order issued by the magistrate on May 28, 1975, is hereby vacated.

5. The Steelworkers' motion for further discovery is passed.

6. The Steelworkers' motion to expedite decision is passed as moot.

RAYMOND J. PETTINE
Chief Judge
Enter: February 13, 1976

District Court of the United States for the District of Rhode Island

GRINNELL CORPORATION,
PLAINTIFF

v. CIVIL ACTION No. 4926

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATIVE SERVICES OF THE STATE OF RHODE ISLAND,
DEFENDANTS

AND

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GREATER PROVIDENCE CHAMBER OF COMMERCE,
PLAINTIFFS-INTERVENORS

AND

THE UNITED STEELWORKERS OF AMERICA, A.F.L.-C.I.O.,
DEFENDANT-INTERVENOR

Memorandum and Order.

On February 13, 1976, this Court vacated the Magistrate's protective order which had prohibited the defendant-intervenor, United Steelworkers, from conducting depositions of Messrs. Northrup, Thieblot and Cowin. Since the depositions

were to be strictly limited to the involvement of these three persons in the creation and publication of Report No. 6, an evidentiary study which was not prepared in anticipation of litigation, this Court concluded that these depositions were governed by the principles of liberal pre-trial discovery embodied in Federal Rule of Civil Procedure 26(b)(1) rather than by the exception for trial preparation materials of experts in Rule 26(b)(4). Plaintiff Grinnell and the three experts now ask this Court to reconsider that ruling or, in the alternative, to certify the question of the scope of Rule 26(b)(4) for appeal before the Court of Appeals for the First Circuit.

The motion to reconsider is denied. The plaintiff has failed to bring to this Court's attention any new facts or legal arguments which were not previously considered by the Court. Both the academic freedom issue and the argument concerning the implications of this Court's ruling in other circumstances, which the plaintiff stresses in its memorandum of law, were both raised in the plaintiff's memorandum of September 9, 1975, and were carefully considered by this Court before it issued its February 1976 ruling.

The alternative motion to certify this issue for appeal is also denied. Among the prerequisites for certifying questions for interlocutory appeal under 28 U.S.C. § 1292(b) are that the issue is a "controlling question of law" and that "an immediate appeal . . . may materially advance the ultimate termination of this litigation." Neither requirement is met in this case. The order the plaintiff seeks to appeal is a discovery order, and "ordinarily it is difficult to believe that a discovery order will present a controlling question of law or that an immediate appeal will materially advance the termination of the litigation." Wright & Miller, Federal Practice and Procedure: Civil § 2006 at 31. The plaintiff has not demonstrated that this is a truly exceptional case requiring immediate appeal. *Cf. In Re Heddendorf*, 263 F. 2d 887 (1st Cir. 1959). *See*

Grinnell Corp. v. *Hackett*, 519 F. 2d 595, 598 (1st Cir. 1975), *cert. denied* 96 S. Ct. 566.

The plaintiff's motion for reconsideration or in the alternative for certification is hereby denied.

RAYMOND J. PETTINE
Chief Judge
Enter: April 19, 1976

United States District Court
District Of Rhode Island

[Caption omitted in printing.]

Notice of Appeal.

Notice is hereby given that Dr. Herbert R. Northrup hereby appeals to the United States Court of Appeals for the First Circuit from the order entered in this action on February 13, 1976 vacating the Magistrate's protective order of May 28, 1975, and the order of April 19, 1976 denying the motion for reconsideration or in the alternative for certification of the order of February 13, 1976.

GEORGE M. VETTER, JR.
Dated: May 19, 1976

United States Court of Appeals For The First Circuit

Misc. No. 76-8063.

GRINNELL CORPORATION,
PLAINTIFF, APPELLEE,

v.

MARY C. HACKETT, ETC., ET AL.,
DEFENDANTS, APPELLEES.

DR. HERBERT R. NORTHRUP,
APPELLANT.

Order of Court

Entered June 14, 1976

Upon a review of the record on appeal,
It is ordered that the appeal herein is dismissed for lack of appellate jurisdiction.

By the Court:

/s/ DANA H. GALLUP
Clerk.

United States Court of Appeals For The First Circuit

No. 76-1346

IN RE DR. HERBERT R. NORTHRUP,
PETITIONER

Petition for Writ of Mandamus and Prohibition.

Dr. Herbert R. Northrup petitions this court to issue a writ of mandamus under the "All Writs Statute" 28 U.S.C. 1651 to the United States District Court for the District of Rhode Island, to review:

(a) the opinion and order dated February 13, 1976 of The Honorable Raymond J. Pettine vacating a protective order issued by the United States Magistrate to prevent the defendant-intervenor, United Steelworkers of America, from taking Petitioner's deposition; and

(b) the memorandum and order of Judge Pettine dated April 19, 1976 denying the motion for reconsideration thereof, or, in the alternative, for certification of the issue for appeal.

STATEMENT OF FACTS.

This action was commenced on May 15, 1972 by the Grinnell Corporation.

In the action Grinnell contends that the payment by the State of Rhode Island of unemployment compensation pay-

ments to strikers is unconstitutional and illegal under the pre-emptive scheme of federal law governing labor-management relations.

The defendant is Mary C. Hackett, Director of the Department of Employment Security of the State of Rhode Island. (John J. Affleck, Director of the Department of Social and Rehabilitative Services of the State of Rhode Island was also named as a defendant in connection with a similar contention of Grinnell's respecting payment of welfare to strikers; Grinnell has abandoned that contention.)

The Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce have intervened as plaintiffs. The United Steelworkers of America, AFL-CIO, has intervened as defendant.

On May 30 and 31, 1972 the District Court heard Grinnell's motion for a preliminary injunction.

At that hearing Grinnell produced the testimony of two expert witnesses, Armand J. Thieblot, Jr. and Ronald M. Cowin, on the effect of public payments to strikers. Grinnell also introduced their study, Report No. 6 WELFARE AND STRIKES: *The Use of Public Funds to Support Strikers*, into evidence as a full exhibit. This study was published by the Industrial Research Unit of the Wharton School of Finance and Commerce at the University of Pennsylvania.

Petitioner was then and is now the Director of the Industrial Research Unit. At the hearing on the preliminary injunction the intervening plaintiffs, Chambers of Commerce, attempted to introduce petitioner's affidavit giving his expert opinion on the same subject. The affidavit was not prepared for this case. The District Court refused to admit the affidavit into evidence as a full exhibit but rather only marked it for identification. A copy of the facing sheet of the affidavit is attached as exhibit A.

The District Court denied the preliminary injunction and granted defendant's motion to dismiss. This court reversed and remanded the case on March 15, 1973. *Grinnell Corp.* v. *Hackett*, 475 F. 2d 404 (1st Cir. 1973).

Fully two years after the remand, the defendant-intervenor, Steelworkers, noticed the depositions of Thieblot, Cowin, and the Petitioner, and caused deposition subpoenas *duces tecum* to issue. Grinnell and the three experts moved for a protective order on May 15, 1976. The Magistrate found and entered an order to the effect that the three deponents were experts under rule 26(b)(4)(B) and could not be deposed. Exhibit B. However, he issued the order without prejudice to a motion by the Steelworkers under FRCP 26(b)(4)(B) for permission to depose these experts.

The Steelworkers moved for reconsideration, or, alternatively, for permission to take the depositions under FRCP 26(b)(4)(B). The Steelworkers based their motion solely on its attorney's affidavit, which was the same affidavit as had been submitted at the first hearing, and upon docket entries from the *Dow* case (*Dow Chemical Company, et al* vs. *S. Martin Taylor, et al*, a similar case pending in the Eastern District of Michigan). Exhibit C.

At the hearing Petitioner introduced into evidence an affidavit evidencing a concerted and systematic violation of his rights of academic freedom by powerful labor union leaders and interests, the clear purpose being to chill academic research in the area of union efforts to obtain public benefits for strikers. Exhibit D.

The Magistrate denied the Steelworkers permission to take the deposition for failure to show exceptional circumstances as required by the Rule; denied the motion by the Steelworkers to reargue; ruled that it was "more likely than not" in light of Petitioner's affidavit that the deponents would be visited with the evils FRCP 26(c) seeks to protect against; and,

found as a fact that the Steelworkers' purpose had "every appearance" of attempting to take the depositions for a private purpose and not for the purpose of the litigation. Exhibit E.

The Steelworkers sought *de novo* review of these rulings before the District Court.

In an Opinion and Order dated February 13, 1976 the District Court ruled that it could not review *de novo* in light of the local rules governing utilization of Magistrates, but that it could review questions of law. In that review the District Court did not distinguish between Cowin and Thieblot, who had testified in the case and who were authors of the study submitted into evidence, and Petitioner, who neither testified nor authored any evidence in the case. The District Court mistakenly stated (a) that Grinnell had adduced Petitioner's affidavit at the trial, and (b) that Petitioner's affidavit had been submitted into evidence.

The District Court vacated the protective order and granted the Steelworkers leave to take the depositions of the experts (including that of Petitioner). It ruled (a) that FRCP 26(b)(4)(B) did not apply but that the preamble to FRCP 26(b)(4) was applicable; and (b) that the Magistrate's finding of a "private purpose" in taking the depositions was clearly erroneous because the background of Cowin and Thieblot's study was relevant to its credibility. Exhibit F.

The gist of the District Court's ruling is that under the preamble to FRCP 26(b)(4) a party has an absolute right to have discovery of facts known and opinions held by an expert, who himself, however, is in no way related to the case so long as the expert facts and opinions are relevant to the subject matter of the action, and were not acquired or developed in anticipation of litigation or for trial.

Petitioner moved for reargument, and in the alternative for certification of the question to this court. Among other things the motions pointed out the crucial factual errors in the

previous opinion with respect to Petitioner's lack of any involvement in the case.

On April 19, 1976 the District Court denied these motions. It did not note or correct the crucial factual errors. Exhibit G.

Petitioner appealed these orders on the authority of *Covey Oil Company* v. *Continental Oil Company*, 340 F. 2d 993 (10th Cir. 1965). However, this court dismissed the appeal *sua sponte* on June 14, 1976. Petitioner now seeks review by this petition.

Statement of Issues Presented.

1. Whether the District Court erred in its interpretation of FRCP 26.

2. Whether the ruling of the District Court does not amount to a taking of an expert's intellectual property without due process of law.

3. Whether the District Court did not in fact review the order of the Magistrate *de novo* and improperly substitute its own findings of fact for that of the Magistrate.

4. Whether the District Court erred in not treating petitioner's case as different from that of Cowin and Thieblot.

5. Whether the District Court erred in not affording petitioner his rights under the First Amendment by not upholding the protective order protecting him against a concerted and systematic violation of his rights of academic freedom.

Statement of Reasons why Writ should Issue.

1. This Court has jurisdiction to issue the Extraordinary Writ prayed for by virtue of the "All Writs Statute," 28 U.S.C. § 1651.

2. The damage to the Petitioner in terms of the violation of his rights of academic freedom is real and immediate, and cannot be protected once his deposition has been taken.

3. Unless the Court grants the separate appeal filed by Petitioner, there is no other method by which Petitioner, a non-party, can have his cause heard before this Court. Cf. *Covey Oil Company* v. *Continental Oil Company*, 340 F. 2d 993 (10th Cir. 1965).

4. The District Court erred in its interpretation of FRCP 26 and failure to review that ruling now would permit the taking of an expert's intellectual property without due process of law.

5. The District Court was clearly erroneous in its statement that Petitioner's affidavit was introduced into evidence at the preliminary injunction hearing, and as a result it failed to consider Petitioner separately from the other experts as having no direct connection with the suit.

WHEREFORE, Petitioner respectfully prays

1. That a writ of mandamus issue out of and under the seal of this Court directed to the United States District Court for the District of Rhode Island commanding said Court to certify and send up to this Court on a day to be designated the original transcript of the record and all of the relevant materials relating to this proceeding in the District Court.

2. The Orders of February 13, 1976 and April 19, 1976 be reversed.

3. That a writ of mandamus issue to The Honorable Raymond J. Pettine, United States District Judge, District of Rhode Island, directing him to enter an order reinstituting the Magistrate's protective order as to the Petitioner.

4. That Petitioner be granted such other and further relief as may appear proper.

GEORGE M. VETTER, JR.

Dated: July 26, 1976

United States Court of Appeals for the First Circuit.

No. 76-1346 Original.

IN RE

DR. HERBERT R. NORTHRUP,
PETITIONER.

Memorandum and Order.

Entered August 17, 1976.

Dr. Herbert R. Northrup petitions for a writ of mandamus directed to the Honorable Raymond J. Pettine, Chief Judge of the District of Rhode Island. We share the petitioner's theoretical concern about overly broad discovery, particularly against persons not directly involved in the litigation. However, we cannot say that the court acted beyond its range of permissible discretion under Rule 26, Fed. R. Civ. P. in allowing defendant-intervenor to take petitioner's deposition. We note the court's language in denying the motion for reconsideration that the deposition was "strictly limited to the involvement of these three persons in the creation and publication of Report No. 6. . . ."

The petition is denied.

By the Court:
/s/ DANA P. GALLUP
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-697

DR. HERBERT R. NORTHRUP,
Petitioner,
v.
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND,
And
UNITED STEELWORKERS OF AMERICA,
AFL-CIO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION OF RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO

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United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION OF RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO

Respondent United Steelworkers of America, AFL-CIO (hereinafter "Steelworkers") submits this brief in opposition to the petition for certiorari which seeks review of the First Circuit's unreported decision denying mandamus in the case of *In Re Dr. Herbert R. Northrup,* No. 76-1346 (filed August 17, 1976) (Pet. App. 88a).

JURISDICTION

The petition is jurisdictionally defective because it was filed out of time. The First Circuit's Memorandum and Order was entered on August 17, 1976 (Pet. App. 88a). It was not until 92 days later on November 17, 1976, that the certiorari petition was filed. No Justice of this Court has extended the time for filing the petition. Therefore the petition was not filed within the statutorily specified time for filing a certiorari petition of 90 days and should be denied. 28 U.S.C. § 2101(c).

ADDITIONAL STATUTES AND RULES INVOLVED

Rule 26(c) of the Federal Rules of Civil Procedure reads in relevant part as follows:

> "**Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; . . . (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; . . . ." (Fed.R.Civ.P. 26(c).

ARGUMENT

Even if the petition were not untimely, it should still be denied. The petition presents no important federal issue. The propriety of the ruling by the courts below permitting petitioner to be deposed and vacating the magistrate's sweeping protective order turns upon the factual determination, adverse to petitioner, that petitioner had substantial prior involvement in this litigation. Moreover, the principles of liberal pre-trial discovery applied by the courts below are consistent with the law applied in other circuits. Thus, this petition is totally undeserving of review by this Court and should be denied.

The underlying litigation is a Supremacy Clause challenge to the Rhode Island statute which requires that the payment of unemployment compensation to persons who are unemployed because of a strike be withheld until after the seventh week of such unemployment.[1] Petitioner has been involved directly in this litigation since its inception almost five years ago. The matter first came on for a hearing in the district court in May of 1972 upon motions for a preliminary injunction and for dismissal. The district court has set forth the details of that Hearing and Dr. Northrup's direct involvement therein as follows:

> "Shortly after this case was commenced in 1972, this court heard the plaintiff's motion for a

1. There is a general statutory requirement in Rhode Island of one week of unemployment before benefits may be paid to any unemployed person, R.I.G.L. § 28-44-14, and an additional six weeks of unemployment is required of persons who are "unemployed because of a strike. . . ." R.I.G.L. § 28-44-16.

> preliminary injunction. At that hearing Armand J. [Thieblot], Jr. and Ronald M. Cowin testified as expert witnesses for Grinnell on the impact of the payment of unemployment compensation benefits to strikers. Both men had been associated with the Industrial Research Unit of the Wharton School of Finance and Commerce of the University of Pennsylvania and were experts by virtue of a study conducted by them beginning in 1970 and published in April, 1972 by the Industrial Research Unit as Report No. 6, entitled *Welfare and Strikers* [sic]: *The Use of Public Funds to Support Strikers*. This study was introduced as an exhibit by Grinnell. Also introduced by Grinnell was an affidavit of Dr. Herbert R. Northrup, Director of the Industrial Research Unit, expressing his expert opinion on the same topic." (Pet. App. 63a).

Thus petitioner gave affidavit testimony supporting Report No. 6 and plaintiffs' case. Admittedly petitioner disputes the district court's finding of fact (Pet. 11, 6), but on appeal from the district court's initial dismissal of this case, the First Circuit specifically noted that petitioner's affidavit was part of the evidentiary record:

> "An affidavit by Herbert Northrup, the supervisor of the project at the University of Pennsylvania School of Finance which led to the book, was also introduced as an exhibit." *Grinnell Corporation v. Hackett*, 475 F.2d 449, 452 (1973), *cert. denied*, 414 U. S. 858, 879 (1973).

In 1973, the First Circuit reversed the district court's order of dismissal and remanded with instructions that the case be tried under an extremely broad

evidentiary standard called the "macrocosmic test."[2] In July of 1974, the Steelworkers served a set of extensive interrogatories upon both plaintiff Grinnell Corporation (hereinafter "Grinnell") and the plaintiff-intervenor Chamber of Commerce (hereinafter "Chamber") seeking identification of each "survey, statistical study, or other document" which supported their position with respect to the elements of the First Circuit's "macrocosmic test." Both the Chamber and Grinnell objected to answering these interrogatories, but in late 1974, the district court directed that these interrogatories be answered. *Grinnell Corporation v. Hackett,* 20 Fed. Rules Serv. 2d 668, 671-673 (D.R.I., filed Dec. 30, 1974), *appeal dismissed, mandamus denied,* 519 F.2d 595 (1st Cir. 1975), *cert. denied sub nom., Chamber of Commerce of U.S. v. Steelworkers,* 423 U. S. 1033 (1975). Thereafter in early 1975, both Grinnell and the Chamber filed responses identifying Report No. 6 and petitioner's affidavit as major pieces of their documentary evidence (Pet. App. 73a).

2. The elements of the "macrocosmic test" were summarized by the First Circuit as follows:

> "The relevant question then in determining this statute's impact upon the federal collective bargaining policy is whether the receipt or expectation of receipt of unemployment compensation benefits after seven weeks of a strike causes workers to stiffen bargaining demands beyond those they would have made without such benefits, to strike in the first instance when they would otherwise have settled, or to continue a strike for a longer period than they otherwise would." *Grinnell Corporation v. Hackett,* 475 F.2d 449, 457-458 (1973), *cert. denied,* 414 U. S. 858, 879 (1973).

The continuing vitality of the "macrocosmic test" as the standard governing Supremacy Clause challenges to state payment of unemployment compensation to strikers is open to question, to say the least, now that this Court has dismissed for want of a substantial federal question an appeal raising a similar preemption issue. *Kimbell v. Employment Security Comm. of New Mexico,* ..... U. S. ....., 97 S. Ct. 36 (1976).

It was in this context of strong reliance being placed upon Report No. 6 that counsel for the Steelworkers decided as a matter of necessary trial preparation that depositions would have to be taken of petitioner, Thieblot and Cowin (Resp. App. 1-2a).[3] All counsel were informed that such depositions "would be strictly limited to discovering the background and details concerning Report No. 6, and . . . the depositions would not be used to attempt to discover any present expert opinion those individuals may now possess which has been developed in anticipation of litigation." (Pet. App. 9-10a). The Steelworkers noticed the depositions of Thieblot, Cowin and petitioner in both *Grinnell* and in *Dow v. Taylor,* C. A. No. 38644 (E.D. Mich.)[4]

3. The Appendix to this Brief contains a reproduction of the affidavit of the Steelworkers' trial counsel, which affidavit was filed in the district court in support of the Steelworkers' appeal from the magistrate's entry of the protective order.

4. The *Dow* case involves a similar Supremacy Clause challenge to Michigan's policy of paying unemployment compensation to strikers. In *Dow,* as here, Report No. 6 and petitioner's almost identical affidavit are part of the evidentiary record, and there, as here, the plaintiffs placed primary reliance upon those documents in responding to an identical set of Steelworkers' interrogatories. When the district court in *Dow* granted the Steelworkers leave to despose petitioner and Thieblot and Cowin, they took the extraordinary step of withdrawing as witnesses in *Dow* rather than be deposed. The withdrawal letter is reproduced in the Appendix to this Brief (Resp. App. 3-4a).

The Discovery Rules provide that, unless limited by a court order, the Steelworkers are entitled to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .". Fed.R.Civ.P. 26(b) (1). The relevancy of the information about which the Steelworkers sought to depose petitioner was not disputed, and both the district court and the magistrate found the information sought to be relevant (Pet. App. 73a).[5] Notwithstanding the clear relevance of the information sought, the magistrate entered a protective order absolutely prohibiting the Steelworkers from deposing petitioner or Thieblot and Cowin. The magistrate also denied the Steelworkers' motion in the alternative for reconsideration of the protective order and for judicial leave to depose the experts pursuant to Fed. R. Civ. P. 26(b)(4) (A) & (B). It was the entry of the protective order which the district court reversed upon the Steelworkers' timely appeal.

The reversal of the protective order does not implicate any important issues regarding the role of magistrates *vis-a-vis* district courts. The district court did no more than hold that the magistrate's finding that petitioner had met the "good cause" requirement of Fed.R. Civ.P. 26(c) was a clear error of law. The magistrate's finding that the likelihood of harrassment was "more probable then not" was held to be legally insufficient to satisfy the "good cause" requirement for a protective order because the information sought was also admittedly relevant (Pet. App. 74a). The standard of review applied by the district court is consonant with the statutorily specified standard of "contrary to law." 28 U.S.C. § 636(b)(1)(A). Contrary to petitioner's assertion (Pet. 17), the district court did not usurp the magistrate's function in noting that it is "undisputed that Report No. 6 was not prepared in anticipation of litigation or for trial. . . ." (Pet. App. 68a). The magistrate made no explicit finding on this point. Indeed, Grinnell never raised this issue in any of the courts below.

Nor does the interpretation which the district court gave to Fed.R.Civ.P. 26(b)(4) conflict with interpretations applied in other circuits. Reading the words of the rule literally, the district court held that the exception to liberal discovery, which Fed.R.Civ.P. 26(b)(4) creates for experts, extends no further than the experts' trial preparation— "facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for trial . . . ." Fed.R.Civ.P. 26(b)(4). This narrow construction of the expert's discovery exemption comports well with the Second Circuit's holding that the policy which underlies Fed.R.Civ.P. 26(b)(4) is to allow "more liberal discovery of potential expert testimony . . . ." *Weiss v. Chrysler Motors Corporation*, 515 F.2d 449, 457 (1975). Indeed, the district court's ruling that an expert is treated just like any other person under the Discovery Rules as to facts

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5. The magistrate's relevancy finding is contained at page 41 of the Transcript of the June 17, 1975 Hearing. In pertinent part, it reads:

> "THE COURT: Well, relevance, given the posture of that in the alternate, either that they are actors, which I have held they are not, or that they are experts, either of them. I think it has little to do with relevancy. *I think what you seek is relevant, that is relevant to the subject matter of the litigation. . . .*" (Emphasis added).

known or opinions held, except as to material acquired or developed in anticipation of litigation or for use at trial, is identical to the interpretation suggested by the commentators and the Advisory Committee. 8 Wright & Miller, *Federal Practice and Procedure,* Civil § 2033 at 257-258 (1970); Proposed Amendments to the Federal Rules of Civil Procedure with Advisory Committee's Notes, 48 F.R.D. 487, 503-505 (1970).

The cases which petitioner has cited are inapposite to the situation here where petitioner will be deposed solely as to the factual background of Report No. 6, which is not part of any expert's trial preparation materials. In each case petitioner has cited, the expert was to be deposed concerning matters which that expert had been specially retained or specially employed to review by the other party for use at trial or "in anticipation of litigation." *See, e.g., Crockett v. Virginia Folding Box Co.,* 61 F.R.D. 312, 320 (E.D. Va. 1974).

Finally, denial of mandamus is especially appropriate in cases, such as this one, where absolute protective orders are denied in the face of broad claims of privilege[6] but where the question of more limited pro-

6. Petitioner asserts an absolute privilege to being deposed based upon an alleged invasion of "academic freedom." The magistrate placed no reliance on petitioner's claim of "academic freedom," and the district court rejected it outright (Pet. App. 77a). Moreover, even if petitioner did have a privilege, which he did not because the deposition will not implicate or interfere with any relationship of petitioner to his pupils, petitioner's affidavit testimony given in the court below would constitute a waiver of any such privilege. *See, United States v. Nobles,* 422 U. S. 225, 239-240 (1975).

tection is left undecided. *Kerr v. U. S. District Ct. for N. D. of Cal.,* ..... U. S. ....., 96 S. Ct. 2119 (1976). In reversing the broad protective order, the district court placed reliance on the fact that "the depositions were to be strictly limited to the involvement of these three persons in the creation and publication of Report No. 6 . . . ." (Pet. App. 76-77a). Likewise, the First Circuit placed reliance upon the narrow scope in denying mandamus (Pet. App. 88a). That the district court has left the door open for more limited protection is obvious from its criticism of the magistrate for banning all discovery instead of "qualify[ing] the Steelworkers' right to discovery in one of the less restrictive ways described in Rule 26(c) . . . ." (Pet. App. 73a). In point of fact, the Steelworkers offered before the magistrate to enter into a broad protective order controlling the manner in which the deposition is taken or the results disclosed.[7]

7. The Transcript of the June 17, 1975, Hearing contains at pages 47 and 48 the following colloquy between the Steelworkers' counsel and the magistrate with regard to protective orders:

> "MR. MILASI: . . . . And I know that the Court has information in which it indicates that unions have pursued Dr. Northrup, but the only thing I can ask the Court to do is to take into account that the Court can control any such problem by a protective order. In other words, if the Court is worried about the results of the deposition and they can be taken and filed or controlled in any way which this court wants to, so they are not disclosed or they are purely part of this public record. If the Court looks at the transcript and says that this is harrassment, that part can be controlled later on. If that is what the court's consideration is.
>
> THE COURT: In other words, the taking of the deposition?

Indeed, this entire proceeding is premature because petitioner has an adequate remedy under Fed.R.Civ.P. 30(d). Once the deposition has begun, petitioner has the right to ask the district court to terminate the deposition or further limit its scope if the particular questions asked at the deposition reveal that the examination is being conducted in bad faith or to annoy or embarrass the petitioner. Petitioner would then have a concrete factual background against which the district court can gauge petitioner's presently abstract contentions of harrassment and invasion of academic freedom. *See, Kerr v. U. S. District Ct. for N. D. of Cal., supra.*

MR. MILASICH: Yes, Your Honor. I mean if that is what this Court is afraid of. Your Honor, we'll take whatever steps as we did in the discovery Friday at the Chamber of Commerce. We agreed to the entry of protective order. We offered to enter into any kind to protect them the way they want. We want the information so that this case can be litigated on its factual merits...."

CONCLUSION

No issue in this case warrants this Court's attention, and none are ripe for review. This untimely petition for certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

Affidavit of Carl B. Frankel

Commonwealth of Pennsylvania
County of Allegheny } ss.:

I, Carl B. Frankel, Esquire, one of the attorneys for the defendant-intervenor United Steelworkers of America, AFL-CIO in *Grinnell v. Hackett,* Civil No. 4926 (D.R.I.) and in *Dow v. Taylor,* Civil No. 38644 (E.D. Mich.), being duly sworn, deposes and says:

1. This Affidavit is given in support of the defendant-intervenor's motion for an order reconsidering and vacating or amending Magistrate Hagopian's ruling made orally on June 17, 1975, denying leave to the defendant-intervenor to conduct depositions of Messrs. Northrup, Thieblot and Cowin limited to discovering the factual background of their study, Report No. 6, "Welfare and Strikes: The Use of Public Funds to Support Strikers" (hereafter "Report No. 6.").

2. The decision to conduct these depositions was mine alone, and it was arrived at without consultation with I. W. Abel, Leo Perlis, Emil Mazey, or with any labor union leader or official.

3. I concluded that the depositions were necessary because Report No. 6 had been submitted in both *Dow* and *Grinnell;* because I felt that Report No. 6 was biased and unsound both as to its conclusions and methodology; and, because I felt that deposing these three individuals would be the only way to bring to light the facts showing that Report No. 6 was so biased and unsound.

4. During the course of scheduling these depositions, I made it clear to attorneys for Dow and the Chamber that the Steelworkers would not proceed with

the depositions if Report No. 6 were to be stricken from the Record and if they were to agree not to cite Report No. 6 in any manner in either *Dow* or *Grinnell*. Our offer was refused.

5. I do not know of any continuing effort by the AFL-CIO or other unions to intimidate or coerce Dr. Northrup, the Wharton School of Business or the University of Pennsylvania, and the Steelworkers' scheduling of the depositions of Messrs. Northrup, Thieblot and Cowin is neither a part of such a union effort, nor is it an attempt by the Steelworkers to coerce or intimidate these individuals or the academic institutions with which they are connected.

6. The Steelworkers were forced to intervene in *Dow* and *Grinnell* in order to protect the legitimate interests of its members against the legal attack mounted by the respective employers, and the purpose of taking these depositions is to garner all the facts surrounding Report No. 6 in order that the evidentiary weight to be accorded that report in these lawsuits may be properly determined.

CARL B. FRANKEL

(SUBSCRIPTION OMITTED IN PRINTING)

(HEADING OMITTED IN PRINTING)

October 9, 1975

The Honorable John Feikens
United States District Court
Eastern District of Michigan
851 Federal Building
Detroit, Michigan 48226

Dear Judge Feikens:

Re: Dow Chemical Company, et al v. S. Martin Taylor, Director, et al CA 38644

We represent the three expert witnesses, Dr. Herbert R. Northrup, Professor Armand J. Theiblot, Jr., and Mr. Ronald M. Cowin.

On September 19, 1975, you heard three motions with respect to the attempt by the defendant-intervenor, United Steelworkers, to depose these experts.

You denied the motion of plaintiff, Dow Chemical Company, for a protective order against taking the depositions.

You denied the motion of our clients, the three experts, for a stay of the depositions.

You expressed your opinion that the United Steelworkers should be permitted to depose the three experts unless either

(a) plaintiffs represented to you that neither would adduce testimony at trial from the defendants, or

(b) the experts themselves represented to you that they did not wish to testify at the trial in behalf of plaintiffs, or either of them.

No such representation having been made at such hearing, you stated you would permit the taking of the depositions with certain precautionary measures but would reconsider granting such permission to depose such experts in the event of receipt from them of their representations that they declined to testify at the trial.

We have just been advised by Mr. George M. Vetter, Jr., attorney for the expert witnesses, that each expert declines to testify at the trial on behalf of any of the plaintiffs and each further declines to be retained or especially employed by plaintiffs in preparation for the trial.

In light of these expressions by the experts, we will immediately prepare and submit to you a proposed Order.

Respectfully,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

NATHAN B. GOODNOW

NBG:mw

P.S. We have unsuccessfully extended our best efforts to communicate with Ross Palmer in order to quote the relevant parts of the transcript covering the September 19 hearing. The statements made in this letter are based upon my notes and recollection.